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No. 99-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1999

H. KEITH HENSON,
Petitioner,

v.

RELIGIOUS TECHNOLOGY CENTER,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Was the decision of the Ninth Circuit Court of Appeals so violative of Petitioner's First Amendment right to freedom of speech that this Court should exercise its power of supervision to (a) review and correct the clearly erroneous fashion in which the statutory defense of fair use to copyright infringement was interpreted and applied and (b) vacate (or order vacated) on First Amendment grounds both the wrongful injunction against Petitioner and the punitive imposition on Petitioner of a large statutory damages award and a large legal fees award?

(2) In the alternative, if the Ninth Circuit correctly interpreted and applied existing precedents, does the First Amendment require that each of the four factors of the statutory fair use defense to copyright infringement instead be applied liberally in favor of an alleged infringer when the alleged infringer has engaged in political speech and social commentary with no effort at financial gain and when the alleged infringer can be threatened with a punitive award of statutory damages?

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity. *See* Supreme Court Rules 14.1(b) and 29.6.

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Constitutional Provisions

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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

H. KEITH HENSON, *Petitioner,*
v.
RELIGIOUS TECHNOLOGY CENTER, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner H. Keith Henson hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Pursuant to the Copyright Act, Petitioner has been found liable for copyright infringement. He has been ordered to pay $75,000 in non-compensatory penalties plus an additional $75,000 in attorneys' fees to Respondent, all for a single message posted to the Internet. In that message, Petitioner protested a TRO issued by a District Court, criticized the Church of Scientology, and included a two-page, allegedly copyrighted text to support his assertion that Scientology was engaged in criminal activity. Respondent Religious Technology Center, the purported copyright owner, is an affiliate of the Church of Scientology.

The Ninth Circuit Court of Appeals summarily affirmed the District Court's decision rejecting Petitioner's argument that this Internet posting constituted a "fair use" under Section 107 of the Copyright Act. The District Court granted summary judgment to Respondent on Petitioner's fair use argument even though the court found that Petitioner's use was noncommercial, constituted

a "criticism designed to stimulate discussion," was not intended to supplant the market for Scientology works, and would likely not result in market harm to Scientology. Petitioner respectfully submits that the judgment against him disregards his fundamental constitutional right to free speech, as well as the decisions of this Court regarding the proper application of the fair use doctrine, and respectfully requests review by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the decision of the District Court is set forth as Appendix A to this petition at pages A1-A6, and at 1999 WL 362837. The opinion of the United States District Court for the Northern District of California is set forth as Appendix B to this petition at pages A7-A23.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 4, 1999. This court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, § 8 of the United States Constitution provides:

> The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to

Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Section 107 of the Copyright Act of 1976, as amended in 1992, 17 U.S.C. § 107, provides:

> § 107. Limitations on exclusive rights; Fair use
>
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

STATEMENT OF THE CASE

On March 26, 1996, Petitioner, H. Keith Henson, delivered to the Honorable Ronald M. Whyte, Judge of the United States District Court for the Northern District of California, a letter he had written protesting a temporary restraining order ("TRO") that had been issued by the District Court against Grady Ward, a critic

of the Church of Scientology ("Scientology"). The TRO prohibited Mr. Ward from disseminating on the Internet certain Scientology texts.[1] Respondent Religious Technology Center ("RTC"), an affiliate of Scientology, alleges that it holds valid copyrights to those texts.

Petitioner, a computer industry professional, had become interested in early 1995 in what he regarded as Scientology's attempts to stifle criticism on the Internet. Petitioner considered Scientology's attack on its on-line critics a threat to fundamental principles of free speech. As a result, Petitioner had begun to follow the progress of lawsuits involving Scientology, including the suit against Grady Ward.

On March 29, 1996, Petitioner attended the preliminary injunction hearing in the *Ward* action, during which the District Court stated that it would issue a preliminary injunction against Grady Ward.

The next day, on March 30, 1996, Petitioner Henson posted to an Internet newsgroup[2] the open letter critical of the TRO in the *Ward* action that he had already delivered to the Court on March 26. The text of his open letter is reproduced in Appendix C.

Petitioner's letter to the District Court was both an attack on governmental power and an attack on the Church of Scientology.

With regard to governmental power, Petitioner said that he had read the TRO against Mr. Ward and considered it a potential violation of the First Amendment. Specifically, Petitioner was

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[1] Judge Whyte issued the TRO in *Religious Technology Center v. Ward,* Case No. 96-20207 RMW (the "*Ward* action").

[2] A "newsgroup" is "[A]n electronic discussion group, serving as a bulletin board for users to post universally accessible messages, and to read and reply to those from others." *Religious Technology Center v. F.A.C.T.Net., Inc.*, 901 F. Supp. 1519, 1524 n.4 (D. Colo. 1995). As this Court has noted, "There are thousands of such [news]groups, each serving to foster an exchange of information or opinion on a particular topic . . . ." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 851 (1997). The newsgroup to which Petitioner posted this open letter was *alt.religion.scientology*, a discussion forum for critics of Scientology.

concerned that the language in the TRO barring all persons in "active concert" with Mr. Ward from posting might apply to "random persons on the Internet" such as himself. In that event, Petitioner wrote to the District Court that:

> [T]he TRO is a violation of my First Amendment Rights to discuss the criminal activities of the cult of Scientology.

With reference to the Church of Scientology, Petitioner posted as part of his open letter to the District Court a two-page Scientology document entitled "New Era Dianetics for Operating Thetans Series 34: The Sequence for Handling A Physical Condition" ("NOTs 34").[3] NOTs 34 provides instructions for the use of an "e-meter" to "handle" physical conditions.[4] Of NOTs 34, Petitioner said:

> Forbidding discussion of this particular document, including quoting it entirely, is clearly against the public interest as well as a violation of my First Amendment rights. Unless, of course, copyright law can be used to prevent disclosure of instructions for criminal activity.

Petitioner then argued that, in his view, NOTs 34 constituted proof that the Church of Scientology had violated

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[3] NOTs 34 is one of fifty-five works, totaling approximately 700 pages and copyrighted together as a single collection known as the "Advanced Technology" materials. Complaint, *RTC v. H. Keith Henson*, U.S.D.C. Northern Dist. Case No. C-96-20271, ¶¶ 6-11. RTC alleges it holds valid copyrights to the Advanced Technology works. *Id.* However, a district court in Colorado has recently found that there is a material issue of fact as to whether the copyrights applying to the Advanced Technology works are valid. *See Bridge Publications v. F.A.C.T.Net, Inc.*, 183 F.R.D. 254 (D. Colo. 1998). The District Court below, however, rejected Petitioner's challenge to the validity of the copyright on NOTs 34. App. B at A9-A11.

[4] The text of NOTs 34 is not included in Appendix C, but is available in the Excerpts of Record filed by Respondent in the Ninth Circuit below, which has been sealed at RTC's request. For background material on Scientology's use of an e-meter and auditing, *see generally Church of Scientology v. Richardson*, 437 F.2d 214 (9th Cir. 1971); *United States v. An Article or Device "Hubbard Electrometer,"* 333 F. Supp. 357 (D.D.C. 1971).

Court orders stemming from FDA actions against the Church in the early 1970s. Those court orders prohibited the Church from making medical claims involving the use of so-called "E-meters" as a cure for illness. S*ee United States v. An Article or Device "Hubbard Electrometer,"* 333 F. Supp. 357 (D.D.C. 1971).[5]

Petitioner quoted the entire text of NOTs 34 to prevent charges that he was unfairly quoting parts of the document out of context. *See, e.g.,* Trial Transcript 353:20-354:1. Referring to NOTs 34 in his open letter to the District Court, Petitioner said:

> I can see why the "Church" of Scientology is trying to suppress this material. If carried out, the instructions in this particular bulletin amount to *criminal* acts, to wit, the practice of medicine without a license. I produce this widely available document in its entirety for your edification.

In the final two paragraphs of his letter, Petitioner stated, in part:

> I know that taking a stand against Scientology is likely to subject me and my family to the same abuse Mr. Ward has experienced. But there comes a point where people of good will *must* stand up to criminals — even to those who are experts in using the courts to harass. . . .
>
> It is my position that public interest in this matter should override *all commercial* copyright concerns. The entire corpus of material the "Church" of Scientology is trying to keep from public view is so at odds with what cult victims are told when they are suckered into it as to constitute fraud — thinly disguised as "religion."

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[5] In *Hubbard Electrometer,* the district court noted: "Hubbard and his fellow Scientologists developed the notion of using an E-meter to aid auditing. Substantial fees were charged for the meter and for auditing sessions using the meter. They repeatedly and explicitly represented that such auditing effectuated cures of many physical and mental illnesses. . . . All this was and is false—in short, a fraud. Contrary to representations made, there is absolutely no scientific or medical basis in fact for the claimed cures attributed to E-meter auditing." 333 F. Supp. at 359.

The same day he posted this open letter to the District Court, Petitioner received an e-mail message from counsel for Respondent RTC. The e-mail message informed Petitioner that the document he had posted was a copyrighted, unpublished work to which RTC held the copyright, and demanded that Petitioner cease and desist from posting the document.

Petitioner was neither cowed nor repentant. The next day, March 31, 1996, Petitioner re-posted his open letter to Judge Whyte, including the allegedly copyrighted NOTs 34 document. Petitioner's response also asked readers of the newsgroup for any other Scientology Advanced Technology materials discussing criminal activities, and announced his intention to post the material "in the public interest."

As part of his Internet posting, Petitioner also posted his responding e-mail to counsel for RTC, which said in part:

> [I will] put it a little nicer than Grady [Ward] would, but you can take your demand, fold it till it is all corners, and stick it where "the sun don't shine."

Four days later, on April 4, 1996, the Religious Technology Center filed an action for copyright infringement and trade secret misappropriation against Petitioner. RTC simultaneously moved for a temporary restraining order and order to show cause regarding the issuance of a preliminary injunction. The matter was assigned to Judge Whyte, who granted a TRO on April 5. The preliminary injunction against Petitioner was granted on April 12, 1996. Because Petitioner could not afford legal representation, Petitioner acted as his own attorney during the TRO, preliminary injunction, and summary judgment phases of the case.[6]

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[6] While Petitioner remained *in pro per* throughout most of the District Court pre-trial action and the appeals (during the "willfulness" damages trial and motion for a new trial only, Petitioner was represented by a solo practitioner, Mr. Graham Berry), RTC was represented throughout this action by up to four law firms: Paul Hastings Janofsky & Walker in New York, Rabinowitz Boudin Standard Krinksy & Lieberman in New York, Kobrin & Moxon in Los Angeles, and the Law Offices of Thomas R. Hogan in San Jose.

Nearly a year later, on February 28, 1997, RTC filed a motion for summary judgment on its copyright claims. The District Court granted RTC's motion on April 15, 1997. In that opinion, which is reproduced in Appendix B to this Petition, the District Court rejected Petitioner's fair use defense under Section 107 of the Copyright Act, 18 U.S.C. § 107. A detailed analysis of the District Court's opinion is set forth below in Section II. As to the four factors enumerated in Section 107, the District Court held as follows:

- Although the purpose of Petitioner's posting was *noncommercial* (a point conceded by RTC) and the posting constituted a "*criticism designed to stimulate discussion*," the first factor nevertheless "*weighs in RTC's favor* since Henson's use is only minimally transformative and does not appear to be in good faith."
- Although NOTs 34 is "more informational than creative, the second factor on the nature of the copyrighted work nevertheless "*weighs heavily against Henson*" because the work was unpublished.
- Although the 700-page NOTs Series was copyrighted as a "single collection," NOTs 34 constituted a separate copyrightable element and the "amount and substantiality of the copying" factor "*weighs heavily in RTC's favor*" because Petitioner copied NOTs 34 "in its entirety."
- Although "the court is not convinced that Henson's posting of the NOTs Series 34 will result in decreased marketability of the work," this factor only "*weighs slightly* in Henson's favor."

App. B at A11-A20 (emphasis added).

Despite finding that the fourth "market harm" factor weighed slightly in Petitioner's favor, the District Court concluded that "*plaintiff's strong showing with respect to the other factors requires a finding of no fair use as a matter of law.*" App. B at A-20 (emphasis added).

Although Petitioner had repeatedly — in his open letter to the District Court, during the hearings on the TRO and

preliminary injunctions sought by RTC and in his *pro per* papers opposing RTC's motion for summary judgment — stated that he believed that the First Amendment to the United States Constitution protected his right to criticize the TRO issued in the *Ward* action and criticize Scientology, the District Court's summary judgment decision appeared to ignore Petitioner's First Amendment arguments. The First Amendment went unmentioned in the court's lengthy Memorandum order granting summary judgment to RTC.

On June 28, 1997, Petitioner, still acting as his own attorney, appealed to the Ninth Circuit the District Court's decision on summary judgment (Appeal No. 97-16160). In January 1998, the Ninth Circuit granted Petitioner's motion to file a late opening brief, and accepted for filing Petitioner's four-page *pro se* brief. Petitioner's brief lacked any citation to legal authority but, once again, put forward Petitioner's First Amendment claim.

In the meantime, the case against Petitioner proceeded to trial on the issue of the willfulness of the infringement and the amount of damages. A jury trial on these issues concluded on May 12, 1998.

The jury found that Petitioner had willfully committed copyright infringement, and awarded RTC $75,000 in so-called "statutory damages" under the Copyright Act. 17 U.S.C. § 504 (c). None of these damages is compensatory. All are, in effect, punishment. Scientology has reportedly touted this $75,000 award as the largest statutory damages award ever recorded for a single copyright infringement.[7]

The District Court entered judgment on the verdict on May 14, 1998, and awarded RTC an additional approximately $13,000

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[7] *See* WALL ST. J., July 21, 1998, reproduced at App. D, at A29.

in costs associated with the case. On September 28, 1998, the District Court awarded RTC $75,000 in attorneys' fees.[8]

As a result of his inability to pay these judgments against him, Petitioner has filed for bankruptcy protection under Chapter 13 of the federal bankruptcy laws.

In June 1998, Petitioner, once again *in pro per*, filed a second appeal in the Ninth Circuit, regarding the final judgment and award of damages against him and certain irregularities in the conduct of the trial (Appeal No. 98-16146). On October 13, 1998, Petitioner filed a sixteen-page *pro se* brief in support of this appeal, again without any citation to legal authority but again putting forward his First Amendment defense. Petitioner's second appeal was consolidated with his first appeal.

In November 1998, Heller Ehrman White & McAuliffe ("Heller Ehrman") agreed to represent Petitioner on a *pro bono* basis in his appeals to the Ninth Circuit. On December 16, 1998 Heller Ehrman brought on Petitioner's behalf a motion to file a formal brief in support of Petitioner's appeal of the grant of summary judgment on the copyright infringement claim, requesting the opportunity to properly brief the issues on appeal, with citation to controlling legal authority on the applicability of the fair use defense and Petitioner's First Amendment rights. RTC vigorously opposed Petitioner's motion to file a late formal brief. On February 16, 1999, the Ninth Circuit denied the motion.

Oral argument on the two appeals was held on March 9, 1999. On June 4, 1999, the Court of Appeals issued an unpublished Memorandum Opinion on Petitioner's appeals, reproduced herein at Appendix A. The Ninth Circuit summarily rejected Petitioner's fair use claim. The entirety of the Ninth Circuit's fair use analysis is as follows:

> Analyzing the four prongs of 17 U.S.C. § 107 (1994), the district court also properly found that Henson's copying did

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[8]RTC had requested $865,000 in attorneys' fees pursuant to 17 U.S.C. § 505. RTC has appealed the $75,000 attorneys' fees award as being too low. Appeal No. 98-17120

not constitute a fair use pursuant to the statute. Notably, Henson copied an unpublished work in its entirety, and conceded that such copying would lead to market harm.[9]

As to Petitioner's claim that his speech was protected by the First Amendment, the Ninth Circuit had only this to say:

> Henson argues that copyright law should not protect alleged criminal material because this would be a violation of the First Amendment. This argument fails in light of *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985), in which the Court stated that the laws of the Copyright Act already embrace First Amendment concerns.

REASONS FOR GRANTING THE PETITION

This is an important case. Despite the formal "non-publication" of the opinions of the Ninth Circuit and District Court below, this case will have a severe chilling effect on both political speech directed at the government and critical speech directed at institutions.

The chilling effect will not come from the formal opinions of the courts below, which will, as a *de jure* matter, continue to be hidden beneath the blanket of non-publication. The chill will emanate instead from the tremendous publicity that the case has received and will receive, both in the traditional press and on the Internet, where the case was born.[10]

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[9] The Court of Appeals' market harm statement contradicted the District Court's finding of no market harm. As explained below in Section II.D., the type of potential market harm conceded by Petitioner was that his posting "will convince the public not to buy the product because it is rubbish." App. B at A-19. However, potential market harm from "biting criticism that suppresses demand" is not actionable under the copyright laws. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

[10] For example, in its lead editorial on July 21, 1998, the *Wall Street Journal* strongly criticized the judgment against Petitioner, saying, in part: "[The District Court], in short, has turned copyright law on its head. . . . The essence of the matter before [the District Court], as anyone not

The message that has been communicated to the public by press and Internet coverage of Petitioner's case is this: The Copyright Act is the Arctic wind of First Amendment Rights. In the face of that wind, it does not matter that an individual who reproduces an institution's "secret" and "unpublished" documents in order to make a political point has published only a small fraction of an entire work. It does not matter that the individual will not benefit financially from the publication. It does not matter that the institution holding the copyright will not be commercially harmed. It does not matter that copying a small fraction of the work verbatim, rather than paraphrasing it, serves to give the accompanying political comment weight and saves it from being sloughed off as exaggeration or inaccurate paraphrase. Nothing matters except the property rights of copyright owners.

Anyone who wants in the future to use even a tiny fraction of the "unpublished" documents of *any* institution to make a point will have to keep firmly in mind what has happened to Petitioner. As punishment for using just two pages of a seven-hundred-page work — all as part of pointed political and social criticism — Petitioner has so far been assessed statutory penalties averaging $37,500 per page copied, not to mention the large legal fees and costs that have been assessed against him. Respondent, meanwhile, is appealing the legal fees award as too low.

The question of whether the Copyright Act can be used in this fashion, not only to abridge Petitioner's First Amendment right to criticize the government and engage in social criticism, but to punish him, on a vague and confusing willfulness standard, for exercising those rights, has importance far beyond the particular facts and the particular parties involved in this case.

(continued from previous page)

blinded by a Pecksniffian literalness can see, is that the plaintiffs are using the law to muzzle their critics." App. D, at A31. This case is known and followed by hundreds of thousands of people. The *alt.religion.scientology* newsgroup in which many people follow this case and others involving Scientology is among the top five to ten groups in readership on the Internet. An Internet search for information regarding this case yields over 200 websites discussing this action.

I. The Petition Should Be Granted Because The First Amendment Requires That The Four Factors of the Statutory Fair Use Doctrine Be Applied Liberally In Favor Of Defendant When the Alleged Infringing Speech Has No Commercial Motive Or Impact, But Consists Purely of Political Protest and Social Commentary.

From the earliest days of the Republic, the Copyright Clause and the First Amendment have been forced to live together in the same Constitution. Observers of that Constitution, like friends of a troubled marriage, have often remarked that this co-habitation might well lead to conflict and crisis. *See, e.g.*, 1 *Nimmer on Copyright* § 1.10[A] at 1-66.43 (1998). [11]

The Copyright Clause, after all, however dressed up it may now be in the finery of "promoting the progress of science and useful arts," was born of governmental censorship. The First Amendment was born of what we have come to regard as a better lineage – the desire of the People for robust freedom of speech, particularly as regards political and social commentary.[12]

To the surprise of many, this potential conflict has been kept at bay. Instead, the crisis-that-might-have-been has been largely avoided by inventive legislation and thoughtful judging. Indeed, in the mid 1980s, this Court appeared to provide some resolution by remarking, in dicta, that First Amendment protections are "already embodied" in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and in the "latitude for scholarship and comment

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[11] Professor Nimmer has termed the relation between copyright law and the first amendment a "paradox." For additional articles exploring the tension between free speech and copyright, *see, e.g.*, S. Fraser, *The Conflict Between The First Amendment And Copyright Law And Its Impact On The Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998); L. Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1999); P. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

[12] *See* Fraser, *supra* note 11, at 19-20 and n.126 (describing history of adoption of Copyright Clause and First Amendment).

traditionally afforded by fair use." *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 560 (1984).

These dicta have been widely interpreted by lower courts to mean that the fair use analysis, by itself, contains a set of automata that will resolve First Amendment concerns without the need to look with care at the demands of the First Amendment itself. *See, e.g., New Era Publications, ApS v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989) ("The fair use doctrine encompasses all claims of first amendment in the copyright field."); *Nihon Keizai Simbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine.").

For cases that involve competing copyright and First Amendment claims by commercial competitors, the "automatic" features of the *Harper & Row* approach may well do the trick. *Harper & Row*, after all, was just such a case.

There, *The Nation* dressed up its fair use claim regarding publication of excerpts from President Ford's unpublished memoirs in the language of freedom of speech and the public interest. But this Court recognized the situation for what it really was: "the piracy of verbatim quotations" for the purpose of achieving a "scoop." *Harper & Row*, 471 U.S. at 559. There is no doubt that such a scoop generated major commercial advantages for *The Nation* and a major loss for the owners of the copyright, who were usurped of their "commercially valuable right of first publication." Hence, *Harper & Row* was very much a case about commerce and competitors. *Id.* at 562.

Petitioner's case is quite different. The District Court identified no money-making motive of any kind by Petitioner. Nor did it find convincing evidence of commercial harm to the copyright owner. In the normal course, one would imagine that this set of findings would remove the case from the purview of the Copyright Act and place it squarely within those First Amendment precedents that encourage political speech (aimed in

this case at the District Court) and social commentary (aimed at the Church of Scientology).

In the arena of political speech, this Court has many times made clear that the First Amendment protects all manner of speech.[13] Indeed, this Court has said, perhaps anticipating Petitioner's comments:

> [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.

New York Times Co. v. Sullivan, 376 U.S. 257, 269 (1963).

Or, as Judge Leval of the Southern District of New York put it:

> First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.[14]

What has been taken away from Petitioner here, then, is his right to speak his mind, both about the orders of the District Court and the alleged actions of the Church of Scientology. Were this a case of commercial competitors, where one had gained financially and the other had lost, perhaps the restriction on Petitioner's speech would be at least open to debate. But this is not such a case.

Rather, this is a case in which Petitioner was engaged in clearly protected political speech and social commentary, using

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[13] *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-36 (1991) (striking down as unconstitutional a rule against extrajudicial statements of lawyers, on ground that "political speech critical of the government and its officials" is protected by the First Amendment); *see also Reno v. ACLU*, 521 U.S. 844 (1997) (protecting indecent speech on the Internet; highest level of First Amendment protection accorded Internet speech); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional an ordinance prohibiting bias-motivated expression).

[14] *Yankee Publishing, Inc. v. News Am. Publishing, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992).

two pages of a seven-hundred page work to make a point and to challenge a judge. Surely, this situation deserved at least a careful articulation and balancing of the First Amendment and Copyright Act principles that are at issue.[15]

Indeed, this Court has said that the challenge of copyright law is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Harper & Row*, 471 U.S. at 580, quoting *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984). Despite that admonition, the District Court seems to have addressed the First Amendment issues not at all, while the Court of Appeals has done so in only the most cursory fashion. Certainly neither court gave much weight in the balance to the information that Petitioner was trying to convey.

It is unclear whether this situation is the result of Petitioner's inartfulness in putting forth his First Amendment Claims or the result of the courts below being lulled into inaction by the seemingly easy-to-apply *dicta* in Harper & Row concerning the relationship between fair use and the First Amendment.[16] Whatever the explanation, Petitioner's First Amendment rights have been violated, through both prohibition and severe punishment.

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[15] *See* Chief Judge Lumbard's concurring opinion in *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966), *cert. denied*, 385 1009 (1967):

> The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate an attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

[16] *See* Fraser, *supra* note 11, at 20 ("[M]aintaining the First Amendment privilege within the fair use doctrine leaves the impression that the interests found in the Bill of Rights can be balanced away every time the price to copyholders is too high.").

Petitioner respectfully requests this Court to correct these errors by granting the Writ, reviewing the case and either:

(1) Holding that, on the merits, the Court of Appeals, which adopted wholesale the analysis of the District Court, simply erred as a matter of law in its application of the statutory factors to be considered under the fair use defense to copyright infringement. If this finding were to be made by this Court, Petitioner would prevail and his First Amendment rights would be vindicated, but the First Amendment constitutional issue otherwise raised would be avoided; or

(2) Holding that, while First Amendment rights in this context do not automatically trump a copyright claim, the First Amendment requires that the four factors of the statutory fair use defense to infringement be applied liberally in favor of an alleged infringer when the alleged infringer has engaged in political speech and social commentary with no effort at financial gain. Under that standard, Petitioner's fair use defense would clearly prevail since, as pointed out below, the Court of Appeals, following the lead of the District Court, in fact tilted the analysis of each factor *against* Petitioner despite the fact that he engaged in clear political speech and social commentary with no commercial gain, and there was no evidence of actionable market harm to Respondent.

II. The Petition Should Be Granted Because The Fair Use Analysis Applied By The Courts Below Failed To Follow The Decisions Of This Court

As this Court has repeatedly noted, the fair use doctrine is an "equitable rule of reason" that "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Harper & Row*, 471 U.S. at 550 n.3; *Sony*, 464 U.S. at 448. The fair use doctrine has

been termed "a critical safety valve of copyright. Flexibility and sensitivity are essential to its successful functioning." [17]

The four factors enumerated in Section 107 are not exclusive, and the application of the fair use doctrine must be evaluated on a case-by-case basis, according to the facts of each case. *Harper & Row*, 471 U.S. at 560; *Campbell*, 510 U.S. at 577-78 ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."). Unfortunately, the enumeration of the four factors of the fair use analysis in Section 107 has resulted in "mechanistic, formulaic decisions"[18] — of which the decisions of the courts below are prime examples.

The Ninth Circuit here adopted wholesale the District Court's flawed analysis, finding that Henson's copying and criticism of NOTs 34 did not constitute a fair use. By its failure to exercise independent review,[19] the Ninth Circuit has sanctioned a departure by the District Court so far removed from the accepted and usual course of judicial proceedings as to call for review by this Court.

A. Petitioner's Use Was Of A Critical, Noncommercial Nature And Was Transformative Under This Court's Decision In Campbell

Section 107 provides that the first factor a court must look at in the fair use analysis is "the purpose and character of the use,

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[17] W. Patry & S. Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 668 CARDOZO ARTS & ENT. L.J. 667, 668 (1993) ("Patry & Perlmutter").

[18] Patry & Perlmutter at 670.

[19] *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"); E. Volokh & B. McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998).

including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. §107(1) (emphasis added) The Ninth Circuit *did not even address* this critical first factor in adopting the District Court's judgment. App. A at A-3.

The District Court, in analyzing the "purpose and character" of Petitioner's use, gave short shrift to the fact that Petitioner's use was noncommercial in nature. Although the District Court noted that RTC had conceded that Petitioner's use was *noncommercial* (App. B at A14), the court gave little weight to Petitioner's stated purposes in posting his open letter — criticism of Scientology and the court's TRO in the *Ward* action and concern to protect the public from fraud and quackery. Instead, the court remarked that "[t]he limited commentary in Henson's posting does not reveal that Henson's purpose was to educate the public about the alleged criminal content of NOTs Series 34." App. B at A15. The court noted only in passing that Petitioner's letter "discusses the temporary restraining order issued in a related case." *Id.*

The District Court concluded that "[t]he posting may be viewed, at best, as *a criticism designed to stimulate discussion*." *Id.* at A15 (emphasis added). Nevertheless, the District Court concluded that the "purpose and use" factor "*weighs in RTC's favor* since Henson's use is *only minimally transformative* and does not appear to be in good faith."[20] *Id.* at A16 (emphasis

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[20]The District Court determined that Petitioner's use "does not appear to be in good faith" because "Henson does not attempt to argue that the copying was unintentional or inadvertent." App. B at A15. However, this completely misapprehends the significance of good faith in the fair use analysis. As Justice Story noted, bad faith exists when a defendant "cites the most important parts of the work, not to criticize, but to supersede the use of the original work." *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901). Such use "will be deemed in law a piracy." *Id; see Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96-97 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) ("This was not legitimate coverage of a news event; instead it was . . . chiseling for personal profit.").

Here, there is no evidence that Petitioner quoted NOTs 34 for personal profit or financial gain. Copyright law allows the intentional

added). The District Court's analysis of the "purpose and character of use" factor, as adopted by the Ninth Circuit, is contrary to law and cannot stand.

First, Section 107 itself clearly provides that "the fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment [or] news reporting . . . is not an infringement of copyright." 17 U.S.C. §107. The very fact the District Court found Petitioner's use to be "a criticism designed to stimulate discussion" establishes that Petitioner's use falls "'comfortably within' [the] statutory categories 'of uses illustrative of uses that can be fair.'" *New Era Publications, Int'l ApS v. Carol Publishing Group*, 904 F.2d 152, 156 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990); *see Campbell*, 510 U.S. at 578 ("The enquiry [into the purpose and character of the use] may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like. . . .").[21]

Second, the District Court erred in failing to give adequate weight to the *noncommercial purpose* of Petitioner's use. *See Harper & Row*, 471 U.S. at 562 ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."); *Sony*, 464 U.S. at 451

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copying or quoting of works for purposes of criticism — this is the essence of fair use. The District Court was unmoved by the genuineness of Petitioner's public interest motive; instead, it appears to have been motivated in its summary judgment determination by the unrepentant, in-your-face nature of Petitioner's advocacy. Indeed, RTC devoted substantial portions of its briefs to the District Court and Ninth Circuit to describing Petitioner's allegedly "arrogant" conduct. *See, e.g.*, RTC's Brief in Appeal No. 97-16160, at 6-19, 41-42. This, Petitioner submits, is not a valid basis for the extreme penalty he has incurred. "Zealots have First Amendment rights too." *Pinette v. Capitol Square Review & Advisory Board*, 30 F.3d 675, 680 (1994), *aff'd*, 515 U.S. 753 (1995).

[21] *See also New Era Publications, Int'l ApS v. Henry Holt Co.*, 884 F.2d 659, 661 (2d Cir. 1990) ("If a [work] falls into one of these categories [criticism, comment, news reporting, etc.], assessment of the first fair use factor should be at an end.") (Miner, J., concurring in the denial of rehearing en banc).

("[A]lthough every commercial use of the copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter."). In the instant case, there was absolutely no use of NOTs 34 for commercial purposes or financial gain, *and RTC conceded as much.* App. B at A14. Accordingly, the District Court should have determined that the noncommercial nature of Petitioner's use supported a finding of fair use. *See Sony,* 464 U.S. at 450-51.

Third, the District Court erred in finding Petitioner's use "only minimally transformative." App. B at A15-16. As this Court unanimously held in *Campbell,* "[t]he central purpose of [the purpose and character use] investigation is to see . . . whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression meaning and message." 510 U.S. at 579. The analysis thus focuses on "whether and to what extent the new work is 'transformative.'" *Id.,* citing P. Leval, *Toward a Fair Use Standard,* 103 HARV. L.R. 1105, 1111 (1990) ("Leval").

Despite finding that Henson's open letter to Judge Whyte was properly characterized as "criticism," the District Court concluded that Petitioner's use was "only minimally transformative" because Petitioner quoted NOTs 34 verbatim and "add[ed] little new expression to the work." App. B at A15. In so doing, the District Court completely misapprehended what this Court meant by "transformative." *See Campbell,* 510 U.S. at 579, citing Leval at 1111.[22]

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[22]A work is transformative if it "employ[s] the quoted matter in a different manner or for a different purpose from the original," and if it uses the original work "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." Leval at 1111 (noting that "[T]ransformative uses may include criticizing the quoted work, exposing the character of the original author, [or] proving a fact."); *see also Castle Rock Entertainment, Inc. v. Carol Publishing Group., Inc.*, 150 F.3d 132, 143

Here, it is beyond dispute that Henson's open letter to the District Court "adds something new, with a further purpose and different character," altering NOTs 34 with "new expression, meaning, or message." *Id.* Petitioner embedded NOTs 34 in a letter openly protesting the injunction issued by the District Court in the *Ward* action and added information about court orders expressly forbidding Scientology to claim that use of e-meters can heal. He did so to support his assertion that Scientology was engaged in illegal conduct. Petitioner's open letter thus *transforms* NOTs 34 from a set of directions for purportedly "handling physical conditions" into evidentiary support for a scathing attack on Scientology for allegedly practicing medicine without a license, defrauding its converts, and using the courts to harass and intimidate critics.

Petitioner was not using NOTs 34 to teach people how to "handle physical conditions," thereby "'supersed[ing] the objects' of the original creation" or "supplant[ing] [the original] work in the marketplace with his own." *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986). Rather, Petitioner's aim was to attack Scientology and to criticize the District Court for restraining the speech of persons critical of Scientology.[23] Accordingly, the District Court's finding that Petitioner's use is "only minimally transformative," and that the first factor "*weighs in RTC's favor*" cannot, as a matter of law, be upheld. If the District Court had taken Petitioner's First Amendment rights into account in applying the fair use doctrine, this "purpose and use" factor should have been weighed in favor of Petitioner.

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(2d Cir. 1998) ("[A] secondary work need not necessarily transform the original work's expression to have a transformative purpose.").

[23]The location of Petitioner's posting is also highly probative of the "further nature" and "different character" of the use. Petitioner posted his open letter to Judge Whyte at the *alt.religion.scientology* newsgroup — an "online form for discussion and criticism of scientology." *RTC v. Netcom On-Line Communications*, 907 F. Supp. 1361, 1365 (N.D. Cal. 1995). Because *alt.religion.scientology* is highly critical of Scientology no one could mistake the purpose and character of Petitioner's letter.

B. The Lower Courts Erroneously Held That The "Unpublished" Nature Of The Work Prevented A Finding Of Fair Use

The second factor a court must examine is "the nature of the copyrighted work." 17 U.S.C. §107(2). "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586.

Here, the Ninth Circuit and the District Court erred in adopting a virtual *per se* rule against fair use of unpublished works. In his opinion, the District Court noted that "[t]he scope of fair use is narrower with respect to unpublished works . . . and the amount of permissible copying will be less in the case of an unpublished work" and noted that "[h]ere, the work at issue is unpublished." App. B at A16. The Ninth Circuit relied upon the fact that NOTs 34 is an allegedly unpublished work in finding that the District Court had correctly ruled against Petitioner. App. A at A-3 & n.3 (citing *Harper & Row* for the proposition that "[t]he fact that a work is unpublished is a consideration which cuts against the infringing defendant").

However, the notion that "the scope of fair use is narrower with respect to unpublished works" is an incorrect statement of the law. In 1992, Congress responded to *Harper & Row*, as well as to certain Second Circuit decisions that seemed to lean toward a *per se* rule against fair use for unpublished works,[24] by amending Section 107 of the Copyright Act to add the following provision:

> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above [fair use] factors.

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[24] *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications, Int'l ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir.), *cert. denied*, 493 U.S. 1094 (1990).

("1992 Amendment"); *see Copyright: Fair Use of Unpublished Works*, H.R. REP. NO. 102-386, 102nd Cong., 2d Sess. (Aug. 11, 1992), *reprinted in* 1992 U.S.C.C.A.N. 2553 (House Report").

The 1992 Amendment makes clear Congress's intention that, "in evaluating a claim of fair use, including claims involving unpublished works, the courts are to examine all four statutory factors set forth in Section 107, as well as any other factors deemed relevant in the court's discretion." House Report at 2561. Therefore, unpublished works are to be treated the same as published works, with a full analysis of the four-factor test and other relevant factors to determine whether a fair use exists. *See, Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) ("Neither *Salinger, Harper & Row*, nor any other case . . . erected a *per se* rule regarding unpublished works. The fair use test remains a totality inquiry, tailored to the particular facts of each case."); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 146 (N.D. Cal. 1994) ("In 17 U.S.C. § 107 Congress explicitly provided that the fair use defense may apply to unpublished work . . . .").[25]

In addition, the District Court erred in its analysis of the second factor in ignoring the impact of whether the work is factual or creative. In general, fair use is more likely to be found in factual works than in fictional works. *Stewart*, 495 U.S. at 237-

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[25] *See also Religious Technology Center v. Lerma*, 897 F. Supp. 260, 264 (E.D. Va. 1995) (in action for infringement based on dissemination of Scientology works on Internet, unpublished nature of works "plays a minimal role in this court's consideration"). In this case, it cannot be said that the work at issue is "unpublished" in the sense understood in *Harper & Row*, where the defendant had usurped plaintiff's right of first publication. 471 U.S. at 564. Here, Scientology has already "published" the subject text to thousands of persons who have paid the proper fee and worked their way through the requisite levels of Scientology training. RTC is thus not attempting to enforce its right of first publication, but is simply seeking to prevent persons who have not paid the requisite fee from seeing and criticizing its works. Treating NOTs 34 as "unpublished" under such factual circumstances is not justified. *See, e.g., Copyright Law Revision — Part 2*, 88th Cong., 1st Sess. 27 (1963) (suggesting that works disseminated to the public in a form not constituting a technical "publication" should nevertheless be subject to fair use), cited in *Harper & Row*, 471 U.S. at 551.

38; *see, e.g., RTC v. Lerma*, 908 F. Supp. 1362, 1367 (E.D. Va. 1995) (Advanced Technology documents "intended to be informational rather than creative and, therefore . . . a broader fair use approach is appropriate."). The District Court considered this issue and concluded that NOTs 34 was more informational than creative. App. B at A16-A17. The District Court, however, then immediately discounted its own conclusion by noting that the Court "remains unconvinced that this factor should play a major role in the context of religious works, which do not easily fit into the creative/informational dichotomy." *Id.* Because the District Court considered only the unpublished nature of NOTs 34, and not its informational nature, it held that the second factor weighed "heavily" against Petitioner. *Id.*

There is, however, no precedent for ignoring a required step in the fair use analysis merely because the work copied is religious. Ignoring the creative/informational dichotomy transforms the second fair use factor into the simple, yet incomplete inquiry: Is the copyrighted work published or unpublished? More importantly, the District Court's analysis reduces the second fair use factor to a *per se* rule favoring the plaintiff in every copyright infringement action where the defendant makes use of unpublished material. In addition, it improperly provides unpublished religious works with more copyright protection than unpublished secular works.

Again, if the lower courts were required to apply the fair use defense liberally in favor of noncommercial, political speech, this factor should have been applied in favor of Petitioner.

C. The Lower Courts Mechanically Focused On The Extent Of The Copying As Preventing A Finding Of Fair Use

The third factor a court must evaluate in the fair use analysis is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. §107(3).

The District Court rejected Petitioner's argument that he copied only 1.4% of the collective work registered with the

Copyright Office, which is the 55 works of the NOTs series, registered under the name of "Advanced Technology." App. B at A18. Instead, the District Court adopted RTC's argument that each work in the NOTs series is a "separate, discrete and finite" work, and that Henson, by copying NOTs 34 in its entirety, had copied the entire work. *Id.* This holding is erroneous because there is no showing that each work in the NOTs series is "separately authored and constitutes a discrete original work[] of authorship." *American Geophysical Union v. Texaco*, 60 F.3d 913, 926 (2d Cir. 1994). In addition, *it contradicts* the District Court's "market harm" finding later in its opinion, in which the court states that it "is not convinced that Henson's posting of the NOTs Series 34 will result in decreased marketability of the work" because "NOTs Series 34 *is just one work in the collective NOTs Series*. . . . Thus, the value to a potential competitor or parishioner possessing NOTs Series 34 alone is not great." App. B at A19.

But even assuming that the two-page NOTs 34 could be classified as a separately copyrighted work, both lower courts erred in analyzing the third factor. The District Court noted that "copying an entire work ordinarily militates against a finding of fair use," and "whatever the use, generally, it may not constitute a fair use if the entire work is reproduced." App. B at A17. The Ninth Circuit perfunctorily concluded that Henson's copying did not constitute a fair use because "Henson copied . . .[NOTs 34] in its entirety," and noted "[i]t is generally not a fair use if the entire work is reproduced." App. A at A3 & n.4.

This mechanical application of the third factor is erroneous. As this Court has noted, the task of analyzing application of the fair use defense "is not to be simplified with bright-line rules." *Campbell*, 510 U.S. at 577-78. With respect to the third factor, courts must determine "whether 'the quantity and value of the materials used' . . . are reasonable in relation to the purpose of the copying." *Id.* at 586. The "extent of permissible copying varies with the purpose and character of the use." *Id.; see also Maxtone-Graham*, 803 F.2d at 1263 ("There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.").

Indeed, courts have held that the copying of an original work in its entirety may constitute fair use. *See, e.g., Sony*, 464 U.S. at 456 (recording an entire television program for the purpose of watching it at a more convenient time ("time-shifting") constituted a fair use since the plaintiff failed to show that this practice would likely cause more than minimal harm to the potential market for their copyrighted works); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153-56 (9th Cir. 1986) (copying of an entire parody of a liquor advertisement constituted fair use because the defendant "did not use more than was reasonably necessary . . .to defend himself against . . . derogatory personal attacks").[26]

In the instant case, the Ninth Circuit and the District Court failed to consider fully the nature and purpose of the open letter to the District Court: to bring to the public's attention what Henson believed to be government conduct that violated his First Amendment right to free speech. Given the obscurity of NOTs 34, its brevity, and Petitioner's fears that he would be accused of taking the document out of context if he quoted any less, Petitioner believed that he could not post any less than he did and persuasively convey his message that the District Court's TRO prevented Henson and others from notifying the public of what he believed to be the Church of Scientology's dangerous and criminal conduct.

Perhaps if Petitioner had been more legally sophisticated, he could have "fair-usified" NOTs 34 in his posting by omitting some portion. Then, perhaps, the District Court might have found in his favor on this third factor. But Petitioner's liability for copyright infringement should not depend on whether he quoted 10%, 50%, or 100% of NOTs 34. The outcome of the fair use analysis should not depend on such mechanistic application of the factors. *See Sony*, 464 U.S. at 449 n.31 (Congress "eschewed a rigid, bright-line approach to fair use."). Instead, the judgment

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[26] *See also Harper & Row*, 471 U.S. at 564 ("[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech").

should center on a sensitive analysis of the context in which the work was quoted, and the purpose for such quotation — an analysis which clearly requires a finding of fair use.

D. No "Market Harm" Exists Where Petitioner's Use Was Non-Commercial And Not Intended To Supplant The Market For Scientology's Works

The final factor a court must examine is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. §107 (4). This factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original." *Campbell*, 510 U.S. at 590. This "market harm" factor has been deemed "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *see also Stewart*, 495 U.S. at 238 ("The fourth factor is the 'most important, and indeed, central fair use factor.").

Analysis of this factor distinguishes between market harm caused by criticism of the work — which is not actionable under the copyright laws — from actionable market harm caused when the allegedly infringing use "supplants the original in markets the original is aimed at." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) ("Copyright law is not designed to stifle critics."). As this Court stated in *Campbell*, "the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it." 510 U.S. at 591-93; *see also New Era*, 904 F.2d at 160 ("Harm to the market for a copyrighted work or its derivatives caused by a "devastating critique" that "diminished sales by convincing the public that the original work was of poor quality" is not within the scope of copyright protection.") (holding that market harm to authorized

biography of L. Ron Hubbard caused by quotations and criticism in defendant's unauthorized biography is not actionable).[27]

Here, there was absolutely no showing that Petitioner's limited use would supplant the market for Scientology's works, and the District Court so held. The District Court correctly found that Petitioner's open letter quoting NOTs 34 would not damage RTC's ability to collect money for showing NOTs 34 to Scientologists. App. B at A19. Nevertheless, the District Court concluded that the lack of market harm weighed only "slightly" in Petitioner's favor and was outweighed by "plaintiff's strong showing with respect to the other factors," which "requires a finding of no fair use as a matter of law." *Id.* at A20.

This finding is in conflict with this Court's decisions that the lack of market harm almost *compels* a finding of fair use. As this Court has noted:

> [A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work, need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.

Sony, 464 U.S. at 450-51; *see also New Era*, 904 F.2d at 160 ("'Where the copy does not compete in any way with the original,' copyright's central concern—'that creation will be discouraged if demand can be undercut by copiers'— is absent.").

Accordingly, the District Court erred in finding that the fourth factor only "slightly" favored Petitioner; instead, the lack of market harm *decisively* favors a finding of fair use.

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[27] *See also RTC v. Lerma*, 908 F. Supp. at 1358: "Regarding the RTC's concern about potential loss of new parishioners, this is the price paid in a free society which encourages an open marketplace for ideas. Free speech protections and the fair use exemption . . . exist to permit open and educated debate on matters of public importance. . . . Harm from legitimate criticism is not actionable under either the First Amendment or the copyright laws."

Surprisingly, the Ninth Circuit contradicted the District Court's finding of no market harm by concluding that Henson's copying did not constitute fair use because Petitioner had "conceded that such copying would lead to market harm." App. A at A-3. What Petitioner admitted, however, was only that his conduct "might convince the public not to buy the product because it is rubbish," "*not* because people will take the material from the Internet and use it." App. B at A19. This is precisely the type of market harm resulting from "biting criticism that suppresses demand" that this Court has held is *not* actionable. *Campbell,* 510 U.S. at 592. Although the Ninth Circuit characterized the "market harm factor as "the single most important element of fair use," App. A at A3, it completely misapprehended it.

If, as Petitioner alternatively proposes, a rule were established instructing courts to liberally apply the fair use factors to support First Amendment interests in cases involving noncommercial, political speech, this factor, too, would require a finding of fair use.

CONCLUSION

The unprecedented judgment below of $75,000 for a single alleged act of copyright infringement, for speech that was noncommercial, not intended to supplant the market for the subject works, and purely for the purpose of protest and criticism, conflicts with fundamental First Amendment guarantees as defined by this Court. Accordingly, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

No. 97-16160; 98-16146

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RELIGIOUS TECHNOLOGY CENTER,
a California non-profit corporation
Plaintiff-Appellee,

v.

H. KEITH HENSON,
Defendant-Appellant

DC No. CV-96-20271-RMW/EAI

MEMORANDUM

Appeal from the United States District Court for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted March 9, 1999
San Francisco, California

Filed June 4, 1999

Before: Herbert Y. C. Choy and A. Wallace Tashima, Circuit Judges, and Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation

In this copyright infringement action, Defendant-Appellant Keith Henson ("Henson") appeals the district court's partial grant of summary judgment for Plaintiff-Appellee, Religious Technology Center ("RTC"),[1] which includes the entry of a permanent injunction issued on June 16, 1997. (Appeal No. 97-16160). Henson also appeals the judgment entered after a jury trial awarding RTC $75,000 in statutory damages for Henson's willful infringement of RTC's copyright. (Appeal No. 98-16146). These two challenges to the district court's judgment have been consolidated on appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291 (1994). We review the grant of summary judgment *de novo*. *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 551, 516 (9th Cir. 1993). We affirm the decision of the district court.

I. Grant of partial summary judgment for RTC

The district court granted RTC's motion for summary judgment on the grounds that Henson had infringed RTC's copyright of the work entitled "NOTs 34"[2] by displaying the work over the internet, and that Henson had no valid defense because Henson's copying of NOTs 34 was not a fair use. Henson argues that copyright law should not protect alleged criminal material because this would be a violation of the First Amendment. This argument fails in light of *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985), in which the Court stated that

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[1] RTC is a California non-profit religious corporation which holds an exclusive license in copyrighted materials of the Church of Scientology, known as the "Advanced Technology".

[2] The Advanced Technology materials include a body of unpublished works called the "New Era Dianetics for Operating Thetans", or "NOTs." NOTs 34 is one of the 55 NOTs issues registered with the U.S. Copyright Office.

the laws of the Copyright Act already embrace First Amendment concerns. *Id.* at 560.

The district court properly found that RTC owned a valid copyright and that Henson had copied NOTs 34, the two elements which must be proven in order to establish copyright infringement. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 449 U.S. 340, 361 (1991).

Analyzing the four prongs of 17 U.S.C. § 107 (1994), the district court also properly found that Henson's copying did not constitute a fair use pursuant to the statute. Notably, Henson copied an unpublished work[3] in its entirety,[4] and conceded that such copying would lead to market harm.[5]

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[3] The fact that a work is unpublished is a consideration which cuts against the infringing defendant. *See Harper & Row*, 471 U.S. at 564 ("The fact that a work is unpublished is a critical element of its 'nature'."); *but see Religious Technology Center v. Lerma*, 897 F. Supp. 260, 264 (E.D. Va. 1995) (noting that amendment to Section 107 after *Harper & Row* "make[s] clear that [t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.") (citing 17 U.S.C.A. § 107 (West Supp. 1995)).

[4] It is generally not a fair use if the entire work is reproduced. *See* 4 Nimmer on Copyright § 13.05[A][3] at 13-185 (1998); *see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) ("ordinary effect" of copying a document in its entirety "militat[es] against a finding of fair use.").

[5] Market harm has been characterized as the single most important element of fair use," *Harper & Row*, 471 U.S. at 566, although the Court later stated that in fair use analysis all the statutory factors "are to be explored, and the results weighed together, in light of the purposes of copyright," *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

We therefore affirm the district court's grant of partial summary judgment and the permanent injunction.

II. Issues arising from the course of trial

Henson raises several issues on appeal regarding the jury verdict and issues that arose during the trial, but Henson failed to amend his notice of appeal to include an appeal of the denial of his motion for a new trial.

Pursuant to Rule 4(a)(4)[6] of the 1998 Federal Rules of Appellate Procedure, Henson's appeal was premature because it was filed prior to the denial of his motion of a new trial. The appeal of the judgment became timely when the district court entered its denial of Henson's motion for a new trial. Because Henson failed to amend his notice of appeal to include the denial of his motion for a new trial, he has not properly appealed that motion. Therefore we will only review those issues which Henson could appeal directly from the judgment. We will not review the two claims Henson has raised which require a

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[6] Rule 4(a)(4) provides in relevant part:

> A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions [including a motion for a new trial] is ineffective to appeal from the judgment or order . . . specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party . . . to amend a previously filed notice of appeal.

The wording differs slights in the 1999 version of the rule, but it is to the same effect. *See* Fed. R. App. P. 4(a)(4)(B) (1999).

postjudgment motion prior to appeal: (1) the sufficiency of the evidence[7] and (2) the excessiveness of the judgment.[8]

Henson may properly appeal the judge's evidentiary rulings directly from the judgment. *See Evanow v. M/V Neptune*, 163 F.3d 1108, 1116-17 (9th Cir. 1998) (reviewing disputed evidentiary rulings directly from judgment without stating that any motions were required in order for court to conduct such review). A new trial based on an incorrect evidentiary ruling, however, is "only warranted ... if the ruling substantially prejudiced a party." *United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992). The trial judge, however, has "wide latitude in the admission or exclusion of evidence where the question is one of materiality or relevancy." *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 773 (9th Cir. 1981) ("and a decision to exclude evidence will not be disturbed unless there was been an abuse of discretion."). Henson has failed to show such an abuse of discretion by the district court in its evidentiary rulings.

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[7] In order to rule on whether the evidence was sufficient to support the judgment, the appellant must make a motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996) ("failure to comply with Rule 50(b) precludes a challenge to the sufficiency of the evidence on appeal.").

[8] In order to determine whether or not the judgment award is excessive, the trial court must have first had a chance to review the question. *See Hahn v. Becker*, 588 F.2d 768, 771 (7th Cir. 1979) ("Absent a timely motion for a new trial and the trial court's ruling thereon this court may not review the alleged excessiveness of the verdicts"); *Baker v. Dillon*, 389 F.2d 57, 58 (5th Cir. 1968) ("Since there was no motion for a new trial in this case, we have no basis for reviewing the trial court's exercise of discretion and therefore no basis for reviewing the adequacy of damages.").

In addition, the failure to move for a mistrial upon an allegation of attorney misconduct weighs heavily against our review of Henson's claim that alleged misconduct by RTC counsel required the district court to hold an evidentiary hearing. *See Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1276-77 (5th Cir. 1989) (failure to request a mistrial on claim of attorney misconduct before the jury deliberations showed that the appellants "gambled" on the jury verdict, and weighed against granting a new trial). "To grant a new trial because of attorney misconduct, 'the flavor of the misconduct must [have] sufficiently permeate[d] [the] entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Larez v. City of Los Angeles*, 946 F.2d 630, 637 (9th Cir. 1991) (citation omitted). Henson has presented no evidence that the alleged misconduct affected the proceedings, nor even that the inappropriate comments allegedly made by RTC counsel were heard by the jury.

We therefore conclude that Henson's challenges to the judgment necessarily fail.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER,
a California non-profit corporation
Plaintiff,

v.

H. KEITH HENSON,
Defendant.

Filed April 15, 1997

Clerk U.S. District Court
Central District of California

Case No. C-96-20271-RMW

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COPYRIGHT CLAIMS FOR RELIEF

Plaintiff Religious Technology Center's ("RTC's") motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 was heard and submitted on April 11, 1997. The court has read the moving and responding papers and heard the argument of the parties. For the reasons set forth below, the court grants plaintiff's motion in part and denies it in part.

III. BACKGROUND

RTC brought suit for copyright infringement and trade secret violations against defendant H. Keith Henson after he allegedly posted and then reposted RTC's unpublished copyrighted work New Era Dianetics for Operating Thetans ("NOTs") Series 34[1] to the Internet. In his answer, Henson denies that he infringed the copyright and asserts various affirmative defenses including failure to state a claim, fair use, copyright misuse, unclean hands, estoppel and violation of public policy.

Plaintiff moves this court to grant summary judgment in its favor on the copyright infringement claims. It seeks declaratory judgment, statutory damages, and injunctive relief with respect to those claims.

IV. LEGAL STANDARD

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Entry of summary judgment is mandated against a party if that party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp v. Catrett*, 2548, 2552-53 (1986). The court

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[1]NOTs Series 34 is part of the collective work known as Advanced Technology, allegedly written by L. Ron Hubbard. Specifically, it is one of 55 individual works contained in the copyrighted NOTs series. *See* Declaration of Warren McShane in Support of Motion for Partial Summary Judgment as to Copyright Claims for Relief ("McShane Decl.") ¶ 7.

must view all evidence in a light most favorable to the nonmoving party. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419,2434-35 (1991). However, credibility determinations, weighing evidence and drawing inferences are jury functions, not those of a judge deciding a motion for summary judgment. *Liberty Lobby*, 106 S. Ct. at 2513.

To withstand a motion for summary judgment, the nonmoving party may not rest on the mere allegations or denial of the adverse party's pleading. Fed. R. Civ. P. 56(e). Rather, the nonmoving party must provide specific facts showing there is a genuine issue of material fact in dispute. *Id.*

V. ANALYSIS

To establish copyright infringement, plaintiff must demonstrate that (1) RTC owns a valid copyright and (2) Henson violated one or more of the exclusive rights set forth in 17 U.S.C. § 106, including the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies to the public, and the right to publicly display the work. *See* 17 U.S.C. §§ 106(1)-(3), (5), 501(a); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282, 1296 (1991).

A. Ownership of a Valid Copyright

Proof of ownership of an existing, valid and registered copyright interest is a statutory prerequisite to filing an infringement action. 17 U.S.C. § 411. The certificate of registration "made before or within five years after first publication of the work . . . constitute[s] prima facie evidence of the validity of the copyright," including originality, compliance with statutory formalities, and copyrightability. 17 U.S.C. § 410(c); *see* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.01[A] at 1-17 (1996). When registration is made more than five years after first publication, the evidentiary weight of the certificate of registration is within the court's discretion. 17 U.S.C. § 410(c). When the plaintiff is not the

author of a work, he must provide evidence of a chain of title from the registrant to him. 3 Nimmer § 12.11[C] at 12-174.

In support of its motion, RTC provides an exhibit containing comparisons of NOTs Series 34 and the "copy" allegedly posted by Henson to the Internet on March 30, 1996.[2] *See* McShane Decl. Ex. D. The exhibit consists of the written segment allegedly copied by Henson, the corresponding Hubbard original, a certificate of copyright registration, a certified photocopy of the masked work on file at the United States Copyright Office, and a full "unmasked" version of the photocopy.[3] *See Id.* Plaintiff also provides copies of assignment and licensing agreements showing the chain of title from L. Ron Hubbard, the apparent author of the works, to plaintiff. *See* McShane Decl. Exs. A, B.

Henson challenges the validity of the copyright on the grounds that there is no copyright notice on the original material, that plaintiff waited beyond the permitted five years to put such notice on the material, and that the material was copyrighted in Hubbard's name "when it was in fact produce[d] by other people such as David Mayo." *See* Response to Motion for Partial Summery [sic] Judgment as to Copyright Claims for Relief ("Opposition") at 4:16-22. As evidence, Henson states that he "[t]hese irregularities are backed up by affidavits filed in other cases which the defendant is expecting to be able to file shortly." *Id.* at 4:20-22. The exhibits attached to the affidavit filed by

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[2] Since RTC provides a comparison with the March 30, 1996 posting only, the court focuses on that posting in its analysis.

[3] Although NOTs Series 34 is registered as a component part of the NOTs Series, it is entitled to copyright protection as a separate work. *See* 37 C.F.R. § 202.3(b)(3)(i)(B) (where a series of unpublished works is registered as a single collection, the registration "extends to each copyrightable element in the collection").

Henson two days before the hearing, however, do not demonstrate that there is any irregularity in the copyright that covers NOTs Series 34. Additionally, it is not clear what Henson means by the "original material" on which RTC allegedly failed to provide copyright notice.

Henson also contends that the licensing agreement between Hubbard's estate and RTC has been "called into question, as the person who benefitted from it the most (Miscavige) was the same person who notarized the transactions." *See Id.* at 5:1-2. he claims that "European handwriting experts indicate that Miscavige as well signed these documents using Hubbard's name." *Id.* at 5:4-5. Henson provides no evidence to support his blanket statements. The court has reviewed the licensing agreement attached as Exhibit A to the McShane Declaration and has not found the signature of Miscavige or Hubbard on the document. Further, the document appears to be notarized by official notary publics who are not parties to the agreements or involved in this case.

Thus, the substantial evidence shows that there is no triable issue of material fact that RTC is the owner of a valid, existing copyright in the NOTs Series of which NOTs Series 34 is a component part.[4]

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[4] At the hearing on the motion, Henson indicated that Magistrate Judge Edward A. Infante has now allowed the deposition of David Miscavige to go forward on issues Henson claims raise doubts as to RTC's ownership of the NOTs Series copyright. If Henson discovers information during the deposition that affects the validity of this order, he may seek leave to file a motion for reconsideration based on newly discovered evidence.

B. Fair Use Defense

Henson admits that he copied NOTs Series 34[5] and posted it to the Internet on March 30, 1996 and again on March 31, 1996.[6] He also admits the he knew the material was copyrighted by "somebody." *See* Kobrin Decl. Ex. C., Henson Dep. at 44:12-15. He claims, however, that he was entitled to do so since it was fair use of the materials. Since Henson raises no other legitimate defense, the dispositive issue as to this motion is whether Henson's use of NOTs Series 34 falls within the fair use exception to the copyright law.[7]

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[5] Henson asserts, however, that he "does not . . . to this day [know] that the material is in fact NOTs Series 34." Opposition at 5:9-12. Specifically, he claims that he is "still trying to make arrangements to see the version RTC is claiming to own of NOTs Series 34." *Id.* at 5:12-13. Henson also claims erroneously, that he is "forbidden" by the court to inspect the NOTs Series 34 attached as Exhibit D to the McShane Declaration. *See Id.* at 5:14-15. A comparison of Henson's admitted postings with NOTs Series 34 shows that the text of two are identical.

[6] Henson posted NOTs Series 34 again on March 31, 1996 after mistakenly believing he failed to post it correctly on March 30, 1996. *See* Declaration of Helena K. Kobrin in Support of Motion for Partial Summary Judgment as to Copyright Claims for Relief ("Kobrin Decl.") Ex. C, Videotaped Deposition of H. Keith Henson ("Henson Dep.") at 41:26-42:6. Henson believes that the Church of Scientology canceled the first posting, although he has no facts to support this belief. *See Id.* at 42:8-44:8.

[7] Henson also claims that he is entitled to post the NOTs Series 34 since copyright infringement is permitted by Internet custom or "Netiquette." There is no legal authority which supports Henson's argument that "Netiquette" permits copyright infringement. Thus, this defense fails.

An author's exclusive rights to reproduce, distribute, and display a copyrighted work under § 106 are limited by the fair use defense, which is set forth in § 107 as follows:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified in that section, for purposes of such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

The fair use doctrine "permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170 (1994) (citation omitted). Whether the fair use defense is available requires a case-by-case determination whether a particular use is fair, *Harper & Row Publishers v. Nation Enterprises*, 105 S. Ct. 2218,2225 (1985), and focuses on the four nonexclusive factors provided in § 107:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four statutory factors are not treated in isolation from one another. *Campbell*, 114 S. Ct. at 1170-71. Rather, "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 1171.

1. Purpose and Character of Use

The first factor looks to the purpose and character of the defendant's use. The inquiry may be guided by the examples given in the preamble to § 107, which includes such purposes as criticism, comment, news reporting, and teaching. *Id.* The main objective for this investigation is to see "whether the new work merely 'supersedes the objects' of the original creation [citations] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" *Id.* (citations omitted). Although such transformative use is not absolutely necessary to find fair use, such works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." *Id.* The more transformative the new work, the less significance the other factors will have against a finding of fair use. *Id.*

RTC does not dispute that Henson's use was noncommercial but argues that his posting of the work was "completely non-transformative." Henson contends that "each and every line was transformed by being marked with the >, acknowledging in Usenet site that the line is quoted from another source." This in itself does not make a use transformative.

Henson also argues that the purpose of his posting is to educate the public and that this purpose overrides copyright law. *See* Opposition at 10:8-9, 11:10-22. He explains that "the posting was done in order to aid the public interest by warning the public against an unobvious danger of harm, established by a previous court order."[8] *Id.* at 12:22-24. He claims that NOTs Series 34 is a

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[8] Henson is apparently referring the [sic] an order issued by Judge Gesell in *United States v. An Article Device "Hubbard Electrometer," et al.*, 333 F. Supp. 357 (D.D.C. 1971), which he claims "forbids Church of Scientology and all related organizations from claiming to heal using an

"criminal instruction manual for the illegal practice of medicine, and it violates a Court order which expressly forbids Scientology to claim to be healing by using the E-meter." *Id.* at 10-1-4. Henson suggests that where there is a matter of public safety involved, the concept of fair use should be extended. *Id.* at 13:4-6. The limited commentary in Henson's posting does not reveal that Henson does not sufficiently explain why he needed to post the entire text of NOTs Series 34 to educate the public.

The posting may be viewed, at best, as a criticism designed to stimulate discussion, as his stated reason set forth in his March 30, 1996 posting is to "discuss any parts of NOTS which amount to manuals for criminal activities." McShane Decl. Ex. D, Henson's Copy. Even when treated as a criticism, however, Henson adds little new expression to the work. Much of the commentary does not discuss the content of NOTs Series 34. Henson posts NOTs Series 34 in the context of an "Open Letter to Judge Whyte" which discusses the temporary restraining order issued in a related case. The posting also seeks more "NOTs materials, stolen or not, which describe[] the criminal activities" and states that he intends to post such NOTs since it is in the public interest. *Id.* The court finds that Henson's very limited commentary is only minimally transformative.

Another consideration in evaluating this factor is the propriety of the defendant's conduct. *See Nation*, 105 S. Ct. at 2231-32 (citing 3 Nimmer § 13.05[A] at 13-72). "Fair use presupposes 'good faith' and 'fair dealing.'" *Id.* at 2232 (citations omitted). Here, Henson does not attempt to argue that the copying was unintentional or inadvertent. He has admitted that he knew the material was copyrighted but felt that discussions such

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(continued from previous page)
'E-meter.'" Henson has not shown how this ruling defeats plaintiff's motion in the present action. *See* Order Granting Plaintiff's Motion to Dismiss Counterclaims; Denying Defendant's Motions for Summary or Declaratory Judgment on Criminality of NOTs 34 and Whether it Violates Court Order, etc., dated August 5, 1996.

as his "are in the public interest, which override[] commercial copyright considerations." McShane Decl., Ex. D, Henson's Copy. The Supreme Court rejected a similar argument in *Nation*, recognizing that "[t]he fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *Nation*, 105 S. Ct. at 2229 (citing *Iowa State Univ. Research Found., Inc. v. Am. Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980)).

Despite Henson's noncommercial use, the court finds that this first factor weighs in RTC's favor since Henson's use is only minimally transformative and does not appear to be in good faith.[9]

2. Nature of Copyrighted Work

The second factor focuses on whether the copyrighted work is published or unpublished and whether it is informational or creative.

a) Published and Unpublished Works

The fact that a work is unpublished is a critical element of its "nature." *Id.* at 2232 (citing 3 Nimmer § 13.05[A]). The scope of fair use is narrower with respect to unpublished works, *see Id.*, and the amount of permissible copying will be less in the case of an unpublished work. *See* H.R. Rep. No. 102-286, 102d Cong., 2d Sess. 8 (1992); *see also* 3 Nimmer § 13.05[A][2][b] at 13-178-184. Here, the work at issue is unpublished.

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[9] The court recognizes that it has found that a question of fact exists as to whether Henson's posting constitutes willful infringement. Even if Henson believed in good faith that he could infringe for the public good, the first factor would still weigh in RTC's favor, as Henson's posting was only minimally transformative.

b) Informational or Creative Works

The scope of the fair use doctrine is broader with respect to factual works than creative or literary works. Courts dealing with this issue have recognized that Hubbard's works are difficult to classify and have differed in their conclusions of into which categories the works fall. *See New Era Publications Int'l, ApS v. Carol Publishing Group*, 904 F.2d 152, 158 (2d Cir. 1990) ("reasonable people can disagree over how to classify Hubbard's work," but works are "more properly viewed as factual or informational"); *Religious Tech. Center v. Lerma*, 908 F. Supp. 1362, 1367 (E.D. Va. 1995) (Advanced Technology documents "intended to be informational rather than creative and, therefore, . . . a broader fair use approach is appropriate"); *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 636 (S.D. Cal. 1993) (evidence showed that Hubbard's works are "product of his creative thought process, and not merely informational"). The work at issue here sets forth a step-by-step sequence for handling a physical condition. It is part of the NOTs Series, which is one of the gradient counseling levels delivered by the Church of Scientology. Thus, the court finds that since NOTs Series 34 may be considered a type of guideline to follow, the work appears to be more informational than creative.

This court has struggled with this issue before and remains unconvinced that this factor should play a major role in the context or religious works, which do not easily fit into the creative/informational dichotomy. *See Religious Tech. Center v. Netcom On-Line Com.*, 923 F. Supp. 1231, 1246 (N.D. Cal. 1995). However, because NOTs Series 34 is unpublished and its text was copied in its entirety, the court finds that this factor weighs heavily against Henson, despite the work's informational nature.

3. Amount or Substantiality of Copying

The third factor relates to the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107. Analysis of this factor includes examining what

percentage of the original work was copied and whether that portion constitutes the "heart" of the copyrighted work. *Nation*, 105 S. Ct. at 2233. Copying an entire work ordinarily militates against finding of fair use, although it is not an absolute rule. *See Sony Corp. v. Universal City Studios*, 104 S. Ct. 774, 792 (1984). Generally, no more of a work may be taken than is necessary to make the accompanying comment understandable. *Supermarket of Homes, Inc. v. San Fernando Valley Bd.*, 786 F.2d 1400, 1409 (9th Cir. 1986). Finally, "whatever the use, generally, it may not constitute a fair use if the entire work is reproduced." 3 Nimmer § 13.05[A][3] at 13-185.

Henson claims that he only copied 1.4 percent of the complete NOTs series, which is the "unit" registered with the Copyright Office. RTC contends that Henson copied the entire NOTs Series 34 since each component of the NOTs Series is separate, discrete and finite, with an individual heading and closing, a start and a finish. *See* McShane Decl. ¶ 7. Where a series of unpublished works is registered as a collective work, the registration extends to each copyrightable element in the collection. *See* 37 C.F.R. § 202.3(b)(3)(i)(B). Thus, the "work" analyzed for the purposes of the third fair use factor of "amount taken" is the individual work, not the collective work. *See Am. Geophys, Union v. Texaco, Inc.*, 802 F. Supp. 1, 17, (S.D.N.Y. 1992) *aff'd*, 60 F.3d 913 (2d Cir. 1994) (for purposes of fair use analysis, "copyrighted work" is individual periodical article, even though copyright covered entire issue). Because Henson copied NOTs Series 34 in its entirety, this factor weighs heavily in RTC's favor, especially since the work is unpublished.

4. Effect on Potential Market of Value of Work

The final factor involves "the extent of market harm caused by the particular actions of the alleged infringer" and "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original." *Campbell*, 114 S. Ct. at

1177 (quoting 3 Nimmer § 13.05[A][4] at 13-102.61). Although this factor is often seen as the most important criterion of fair use it "must almost always be judged in conjunction with the other three criteria." *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983) (citation omitted). The fourth factor "militates against a finding of a fair use if there is a 'showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.'" *Los Angeles News Service v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992).

Plaintiff claims that Henson's copying activities have the potential to diminish or prejudice the value of the unpublished copyrighted works in question. It claims that plaintiff and its affiliated entities have been faced with a "number of ex-parishioners using copyrighted materials to set up and market 'religious' training adapted from the Scientology religion." Motion for Summary Judgment as to Copyright Claims for Relief at 12:24-25. RTC further argues that if Henson is allowed to continue to infringe, "the potential for widespread adverse impact to RTC will be exacerbated exponentially, given the number of potential and threatened infringers and the ease with which they can disseminate RTC's confidential copyrighted works at the strike of a computer key." *Id.* at 22:1-4.

Although plaintiff offers no evidence in support of these assertions, Henson does not dispute this point. He concedes that the discussion and availability of the NOTs Series on the Internet may have adversely affected the value or marketability of the work since "*not* because people will take the material from the internet [sic] and use it, but because they will avoid i[t] for reasons internal to the work itself." Opposition at 13:19-21. He claims that the "unauthorized circulation will convince the public not to buy the product because it is rubbish." *Id.* at 13:22-24. Henson then claims that he did not post the work to "decrease sales for selfish or malicious reasons" and again argues that he acted for the protection of the public. *Id.* at 13:11-12.

Although Henson does not dispute and even agrees that his use may diminish the potential market, the court is not convinced that Henson's posting of the NOTs Series 34 will result in decreased marketability of the work. RTC has not presented sufficient evidence to show that a competitor of Scientology could use this single NOTs Series 34 to set up similar religious training programs. Further, NOTs Series 34 is a just one work in the collective NOTs Series, which in turn is one gradient counseling level that must be completed before the next is started. Thus, the value to a potential competitor or parishioner possessing NOTs Series 34 alone is not great. Thus, the court finds this factor weighs slightly in Henson's favor.

5. Equitable Balancing

The court finds that the evidence presented sufficiently shows that the copying of the unpublished NOTs Series 34 in its entirety combined with the minimal commentary negates a finding of fair use on summary judgment. Even though the fourth factor weighs slightly in Henson's favor, plaintiff's strong showing with respect to the other factors requires a finding of no fair use as a matter of law.

6. Conclusion

On his statutory fair use defense, Henson is the nonmoving party who "will bear the ultimate burden of persuasion at trial." *See Celotex*, 106 S. Ct. at 2254. Accordingly, RTC's burden as to fair use "may be discharged by pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.* Then, the burden shifts to Henson to set forth sufficient facts showing that there is a genuine issue of material fact for trial. Since Henson has not done so, summary judgment is appropriate as to RTC's copyright claims.

C. Permanent Injunction

As a general rule, a permanent injunction will be granted when copyright infringement liability has been established and there is a threat of continuing violations. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (upholding permanent injunction where threat of violation was clear). Section 502(a) authorizes the court to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." RTC urges the court to grant permanent injunctive relief as to the entire NOTs Series in light of Henson's history of infringement and threats.

Here, Henson posted NOTs Series 34 with the knowledge that it was copyrighted. Further, Henson has solicited and threatened to post other Advanced Technology works in an attempt to reveal the alleged criminal nature of the postings. Thus, it is not unlikely that he will attempt to infringe RTC's copyrights in the future. Accordingly, permanent injunctive relief is granted as to the entire copyrighted NOTs Series. *See Broadcast Music, Inc. v. United States Shoe Corp.*, 211 U.S.P.Q. 43, 45 (C.D. Cal. 1980), *aff'd*, 678 F.2d 816 (9th Cir. 1982) (where defendants had seven of BMI's copyrights, defendant permanently enjoined from performing "any musical composition which appears in the BMI repertoire"); *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990) (where there was history of infringement and a significant threat of infringement remained, defendant also permanently enjoined from further infringement of plaintiff's cartoon characters not an issue in litigation); *Central Point Software, Inc. v. Nugent*, 903 F. Supp. 1057, 1060 (E.D. Tex. 1995) (where there was continuing threat of infringement, defendant enjoined from "interfering with any of the plaintiff's copyrights, including but not limited to, unauthorized use, copying, and/or distribution of plaintiff's copyrighted software, and from encouraging and aiding others to commit such acts").

Plaintiff is to submit a proposed permanent injunction to the court within twenty (20) days of this order. The proposed order

shall make clear that the injunction does not prevent the fair use of the works, as set forth in 17 U.S.C. § 107.

D. Statutory Damages

In addition to a permanent injunction, RTC seeks enhanced statutory damages of $100,000 for Henson's allegedly willful and knowing infringement of its copyright in NOTs Series 34.

Section 504(c)(1) provides that the copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages "in a sum not less than $500 or more than $20,000 as the court considers just" for each infringement. In cases of willful infringement where the copyright owner sustains the burden of proving, and the court finds, that infringement was done willfully, the court in its discretion may increase the award of statutory damages to a maximum of $100,000. *See* 17 U.S.C. § 504(c)(2). The Ninth Circuit has affirmed an award of such damages at the summary judgment stage. *See Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 (9th Cir. 1990).

An infringement is willful if the infringer knows that its conduct is an infringement or if the infringer has acted in reckless disregard of the copyright owner's right. *Video View, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020 (7th Cir. 1991). Whether a defendant's acts are willful is an issue fact that requires an assessment of the defendant's intent. *Id.* Willful is defined as "knowledge that the defendant['s] conduct constituted an act of infringement." *Peer Int'l Corp.*, 909 F.2d at 1335.

Here, Henson knew the work was copyrighted "by somebody" when he posted NOTs Series 34. He also posted the work believing that such discussion would "override[] commercial copyright considerations." *See* McShane Decl. Ex. D, Henson's Copy. Moreover, Henson admits that he was "inspired" to "look at" and "reproduce" NOTs Series 34 after reading the temporary restraining order issued by this court against Grady Ward, a defendant in a related case, which enjoined Ward from doing the same. *See Id.* Based on this and other evidence

presented, Henson's infringement may have been willful. However, it appears that one who has been notified that certain conduct would constitute infringement, but who reasonably and in good faith believes the contrary, is not liable for willful infringement for his infringing conduct. *See* 3 Nimmer § 14.04[B][3] at 14-60-61. Therefore, the court finds that a question of fact exists as to willfulness.

E. Attorneys' Fees

RTC also seeks an award of its costs and attorneys' fees to compensate it for the great expense which it claims Henson deliberately caused RTC to incur.

In considering motions for attorneys' fees under § 505, the district could should "seek to promote the Copyright Act's objectives." *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996). Relying on *Fogerty v. Fantasy*, 114 S. Ct. 1023, 1033 n.19 (1994), the Ninth Circuit has enumerated several factors which the district court should consider in exercising its discretion to award fees, including "the degree of success obtained; frivolousness; motivation; objective unreasonableness and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* (citations omitted).

Although an award of attorneys' fees may be appropriate at a later date, the court feels that an award at this time is premature. The motion for attorneys' fees is denied without prejudice.

F. Impoundment

The court orders Henson to delete all copies of NOTs Series 34 and any of the other copyrighted NOTs Series from any computer hard drives in his possession within five (5) days of final judgment in this matter. Within that time, he is further ordered to turn over to the Clerk of the Court for impoundment all floppy disks and all hard copies of NOTs Series 34 and any of the other copyrighted NOTs Series in his possession. The impounded

copies shall remain with the Clerk of the Court pending a further order by this court.

VI. ORDER

For the foregoing reasons, the court grants RTC's motion for summary judgment on its copyright infringement claims. It denies the motion as to RTC's request for statutory damages and attorneys' fees.

DATED: 4/14/96

s/ Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

APPENDIX C

**Internet Message Posted By Petitioner,
March 30, 1996
(From Respondent RTC's Excerpts of Record.
Appeal No. 98-16146, Vol. II, at 511-15)**

From netcom.com!hkhenson Sat Mar 30 08:55:14 1996
Xref: netcom.com alt.religion.scientology:161175
Newsgroups: alt.religion.scientology
Path: netcom.com!hkhenson
From: hkhenson@netcom.com (Keith Henson)
Subject: Re: SCAMIZDAT
Message-ID: <hkhensonDp2t5E.Eqn@netcom.com>
Organization: NETCOM On-line Communication Services (408 261-4700 guest)
X-Newsreader: TIN [version 1.2 PL1]
References: <hkkDoyJAt.6ro@netcom.com> <4jhnpo$j22@nyx.cs.du.edu>
Date: Sat, 30 Mar 1996 10:29:38 GMT
Lines: 253
Sender: hkhenson@netcom.netcom.com

tritium (anon47fa@nyx.cs.du.edu) wrote:
: In article <hkkDoyJAt.6ro@netcom.com>, Helena
: Kobrin <hkk@netcom.com> wrote:
: >
: > NOTICE TO READERS:

: > On March 6, 1996, Grady Ward posted a message
: > to the Internet Soliciting a NOTs pack. In a later posting,
: > Ward indicated his intention for SCAMIZDAT to post the
: > contents of that pack to this and the other newsgroups this
: > message has been cross-posted to. SCAMIZDAT had made
: > similar threats. The materials known as new Era Dianetics
: > for Operating Thetans, or "NOTS" are confidential,
: > unpublished works, protected by both copyright and trade
: > secret law.

: the purpose of this posting is to inform you that on March 29,
: 1996 at approximately 11:04 a.m., Judge Whyte specifically
: stated in court that persons other than Grady Ward and those
: acting in concert with him (etc.) are not restricted by his order
: from legally soliciting NOTS.

: helena kobrin is trying to intimidate random netizens without
: basis, and is possibly barratrous in her actions.

[Shelly Thomson posted most of this last night. After talking to the court today, I feel safe in posting this letter. I am also publicly seeking more NOTs material, stolen or not, which describes criminal activities. It is my intent to POST and discuss any parts of NOTs which amount to manuals for criminal activities. Such discussions are in the public interest, which overrides commercial copyright considerations.
Keith Henson]

H. Keith Henson
San Jose, CA

Ronald M. Whyte, Federal Judge
Northern District of California
San Jose, CA

Open Letter to Judge Whyte

Dear Judge Whyte:

In the company of perhaps 100,000 other people (the readers of the Usenet newsgroups alt.religion.scientology, alt. activism, alt.2600,comp.org.eff.talk, and misc.legal), I read the TRO against Mr. Grady Ward and "all persons in active concert." Was it your intent for this order to apply to random persons on the Internet such as myself? If so, I believe the TRO is a violation of my First Amendment rights to discuss the criminal activities of the cult of Scientology.

Upon reading the TRO you approved, I sorted the list of documents attached and ran a text search on the news spool on one of my accounts to see if any of these documents were there. Some were -- though it is impossible to tell if they are the real thing or not. I pulled out the first one which came up. I had not been inclined to look at this material before (it's *boring*), but your TRO inspired me. Assuming this is real, I can see why the "Church" of Scientology is trying to suppress this material. If carried out, the instructions in this particular bulletin amount to *criminal* acts, to wit, the practice of medicine without a license. I reproduce this widely available document in its entirety for your edification.

> HUBBARD COMMUNICATIONS OFFICE
> Saint Hill Manor, East Grinstead, Sussex
>
> HCO BULLETIN OF 14 NOVEMBER 1978
>
> NED for OTs Series 34
>
> THE SEQUENCE FOR HANDLING A PHYSICAL CONDITION
>
> *[TEXT OF DOCUMENT OMITTED]*
>
> L. RON HUBBARD
> FOUNDER

Please note that point 4 states that this process of "blowing BTs" cures illness. The phrases "cease to read" and "no longer read" refer to "auditing" with an E-meter. The "Church" of Scientology is under Court orders stemming from FDA actions in the early 1970s against making such claims involving the use of E-meters. This bulletin (assuming it is real) is written evidence of the level

of contempt the "Church" of Scientology has for the Courts. Scientology even has policies on using the court system to abuse critics and former members.

Forbidding discussion of this particular document, including quoting it entirely, is clearly against the public interest as well as a violation of my First Amendment rights. Unless, of course, copyright law can be used to prevent disclosure of instructions for criminal activity.

With respect to "all persons in active concert," I have certainly been sympathetic to the ideals Mr. Ward espouses, and felt much of the rage he must have felt when (as he puts it) the "criminal cult of Scientology" sent Gene Ingram, a wanted felon, to obtain pictures of Mr. Ward's children from his mother by deceit. For what reason did the "Church" of Scientology need pictures of Mr. Ward's children? Were they planning a kidnapping or was this just a tactic of intimidation? This would certainly be an interesting question for you to skillfully ask of the members of the law firm which paid Mr. Ingram for this particular service. They will be in your court Friday.

I know that taking a stand against Scientology is likely to subject me and my family to the same abuse Mr. Ward has experienced. But there comes a point where people of good will *must* stand up to criminals--even to those who are experts in using the courts to harass. If you think I am being too harsh in this matter, I can supply you with nearly unlimited affidavits and court findings which show a consistent pattern of criminal behavior for this cult over decades of time. Friday I will provide to you a letter from Mr. Arnie Lerma to Judge Brinkma [sic] about the stunts pulled on Mr. Lerma in a related case.

Many of those who read these news groups are outside of the US, and thus not subject to your authority. I, however, am local to San Jose and will be in your court Friday morning. It is my position that the public interest in this matter should override *all commercial* copyright concerns. The entire corpus of material the "Church" of Scientology is trying to keep from public view is

so at odds with what cult victims' are told when they are suckered into it as to constitute fraud--thinly disguised as "religion." On the other hand, if you feel the TRO *does* preclude quoting examples of the copyrighted, trade secret, criminal instruction manuals of the "Church" of Scientology, please let me know.

Sincerely,

H. Keith Henson

APPENDIX D

Lead editorial of the WALL STREET JOURNAL, July 21, 1998 (page A14)

Internet Czar?

Which judge is going to run the Internet? Stanley Sporkin made a stab early on in the Microsoft antitrust case, before an appeals panel removed him. Thomas Penfield Jackson has now assumed that gavel, but so far has had important decisions twice shot down on appeal. With would-be Beltway czars faltering, maybe we should glance toward Silicon Valley, covered by the U.S. District Court in San Jose. There you will meet Judge Ronald Whyte.

Last October Judge Whyte was assigned a case with the pregnant title of *Sun Microsystems Inc. v. Microsoft Corp.* In contrast with Justice Department fantasies about browser predation, Sun's case has a certain basic plausibility. It alleges that Microsoft abused its licenses fooling around with Sun's Java scripting language; Java is intended to work interchangeably on different operating systems, but Microsoft came up with a mutant that works better on Microsoft's Windows. While "merely" a contract case, the outcome may determine Internet language standards, and even more importantly, the rules of cross-licensing on which computer technology ultimately depends.

So putative Czar Whyte's jurisprudence is of some real consequence. As it happens, he already busily if quietly has been establishing cyberlaw, handling a succession of cases concerning the Internet and the crucial question of copyright. The cases arise from the efforts of the church of Scientology to keep its secret but copyrighted scriptures from being put on the Internet by defected members and their newfound cyberfriends.

In 1996, the Church of Scientology sued Tom Klemesrud, the systems operator of a bulletin board, and Netcom, his Internet service provider, for copyright infringement. Both cases eventually were settled. Mr. Klemesrud agreed to pay the church $50,000 to go away, but admitted no liability. Netcom agreed to

establish new protocol for handling disputes in which copyright holders claimed infringement, but were unwilling to display the originals for comparison with posted material.

Some similarly situated individuals, however, are still in Judge Whyte's court. Portions of secret Scientology texts have been popping up anonymously in many Internet discussion groups for some years, and in 1994 ex-Scientologist Dennis Erlich attached his name to one of the postings and promptly was sued by his former brethren for copyright infringement and misappropriating trade secrets. Eighteen months later, Grady Ward, a virulent critic of the church, also was sued in connection with the posted texts. Both suits are pending in Judge Whyte's court.

In 1996, Keith Henson, an electrical engineer, found himself before Judge Whyte; he'd posted church script on the Internet in anger over the discovery that Scientologists were trying to muzzle cybercritics by erasing internet discussion groups. Mr. Henson bravely but no doubt unwisely chose to represent himself in court. Judge Whyte ruled on infringement as a matter of law, and found Mr. Henson guilty without a jury trial. The judge then convened a jury on the question of damages and the Scientologists won $75,000, which their lawyers believe to be the largest copyright infringement statutory damage award ever recorded for a single infringement.

In addition, Mr. Henson faces a possible jail sentence for contempt of court. He also posted a transcript of his own trial that included the sacrosanct material. Mr. Henson said he did not know the computer diskette he received included the material, but Judge Whyte found him in contempt, and reserved judgment on the penalty. He has, however enjoined the defendant from publishing a register of other web sites where Scientology scripture can already be found. Mr. Henson has finally retained counsel from a lawyer who has opposed the Scientologists in other cases, and plans to appeal the decisions.

The Scientologists are merely doing their thing, but both cyberlitigants and First Amendment vigilantes ought to take a close look at Judge Whyte's reasoning. Mr. Henson is not trying to steal the profits from Scientology scriptures; his motive is to criticize what he believes is a corrupt and dangerous organization that practices coercive mind control and engages in medical quackery, in the process bilking vulnerable individuals for thousands of dollars and endangering their health. While admitting that the documents were copyrighted, he felt his postings would be covered under as "fair comment and criticism," a long-standing provision of copyright law.

This, Judge Whyte held, didn't even require a jury to deliberate on Mr. Henson's motives. For one thing, his postings didn't include enough explicit criticism of the material, since he felt it was preposterous on its face. More basically, the judge found, the "fair use" doctrine in its application is much stronger for already published material, and of course the posted scriptures had not been published by the owners of the copyright. You can criticize the texts of a public religion, that is, but a secret religion is immune.

Judge Whyte, in short, has turned copyright law on its head. The purpose of the law is to encourage free speech, giving authors and artists comfort in knowing that others cannot misappropriate their works for their own profit. The essence of the matter before him, as anyone not blinded by a Pecksniffian literalness can see, is that the plaintiffs are using the law to muzzle their critics. In addition, the judge is in the process of morphing an already dubious tort case into a criminal matter through the contempt power—a threat to freedom of speech well recognized in the First Amendment community.

Now, we have a certain sympathy for Judge Whyte, rooted in the feeling that the internet copyright issue is too important to be fought out over secret scriptures and *pro se* defendants. Maybe Judge Whyte could figure out how to send all such cases across the country to Judge Sporkin. All the same, the third would-be

Czar is off on no better foot than the first two—a bad omen for *Sun v. Microsoft*, for internet law and for free speech.

Supreme Court, U.S.
FILED
NOV 17
CLERK

No. 99-456

IN THE

Supreme Court of the United States

H. KEITH HENSON,

Petitioner,

v.

RELIGIOUS TECHNOLOGY CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

This was a straightforward copyright infringement case. Its outcome was mandated by the uncontroverted facts, which were instrumental in the decisions reached by the district and circuit courts.

1. Petitioner ("Henson") copied, displayed and distributed ("posted") on the internet, on two occasions, the entirety of a two page copyrighted work of respondent Religious Technology Center ("RTC").

2. The work was unpublished.

3. The display and distribution of the work was not accompanied by substantial or meaningful commentary *about the work*.

4. Henson knew the work was copyrighted to RTC before he posted it. He was in court on two prior occasions in two separate cases in which the same district judge enjoined two other persons from infringing the same work in a similar manner.

5. After Henson first posted the work to the internet, RTC sent Henson a cease and desist letter. Henson's written response was: "take your demand . . . and stick it where the sun don't shine" (ER 89-91).[1/] He then reposted the work.

6. At the time of both of his infringements, and on several subsequent occasions, Henson openly solicited others to infringe the copyrights in RTC's unpublished works, and to send him copies of such works so that he could do so.

7. Henson admitted in testimony that he undertook the acts of infringement and solicitation of infringement to increase his status on the internet, for fun and entertainment, to harass RTC and drive up its legal expenses, and as revenge for RTC's having taken previous legal steps to enjoin several others from

---

1/ References to "ER ___" are to the excerpts of record in the court of appeals.

virtually identical acts of infringement. Henson thus characterized his acts as "dealing with the jerks who pissed in my sandbox." (Trial Ex. 10-42).

No case permits such blatant abuse of the rights of a copyright holder. Where, as here, the entire body of an unpublished work is copied, displayed and distributed verbatim, there can be no fair use. Nor does the First Amendment protect such piracy of the *expression* (as opposed to the ideas) of a copyright holder, even for the purpose of criticizing that expression.

The petition thus fails to present legal questions appropriate for review by the Court for several threshold reasons: (1) the petition does not even purport to argue that the decision of the court of appeals conflicts with a decision of another circuit or of the Court; (2) the petition essentially asks the Court to review facts and the application of facts to established law, a task ordinarily not appropriate to the Court's certiorari jurisdiction; and (3) the petition raises questions not raised or preserved in the court of appeals. In addition, petitioner fundamentally misstates the record below, in disregard of the jury's verdict and specific findings of the district court, as affirmed by the circuit court, and fails to raise a compelling question requiring the Court's review.

Thus, while petitioner's first question presented proposes a *per se* rule "instructing courts to liberally apply the fair use factors to support First Amendment interests is cases involving noncommercial, political speech" (Pet. at 30), petitioner's basic premise underlying that proposal, that he copied the work as a good faith exercise in public comment and criticism, was explicitly rejected as a matter of *fact* by both judge and jury in the district court. The district court, in granting partial summary judgment on liability for copyright infringement, found that petitioner's "commentary," which accompanied the copying of the entire work, did not address the contents of the

work to any significant degree, thereby rendering the copying of the entire work gratuitous and in apparent "bad faith." The issue was revisited at the trial on statutory damages, at which the jury was required to determine whether or not petitioner's infringement was "willful." Petitioner's trial counsel[2/] was permitted to argue that petitioner's acts were not willful because he believed in good faith that his act of posting the work at issue was an exercise of comment or criticism constituting fair use; indeed, the district court instructed the jury that it could find in favor of petitioner on the issue of willfulness if he established such a good faith belief. Yet the jury rejected the defense, accepting respondent's argument that petitioner acted out of spite, malice, and to enhance his own status among the group of individuals who regularly participate on the internet newsgroup to which petitioner posted the work in question.

Thus, this case does not even begin to present the issue petitioner attempts to raise: whether his copying of an entire unpublished work is protected by the First Amendment because it was necessary to further a purpose of engaging in what petitioner denominates "political" speech. Indeed, petitioner did not raise such an issue on appeal, where he merely argued that he was entitled to copy, display and distribute the entire work because, in his distorted subjective view, it constitutes a "criminal instruction manual." The court of appeals' rejection

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2/ Contrary to a statement in the petition (Pet. at 7), petitioner did not act on a *pro se* basis prior to the jury trial because he could not afford legal representation. Rather, as petitioner gloated in various internet postings, he *chose* to proceed without a lawyer, despite at least four offers of *pro bono* assistance and despite the fact that he was a gainfully employed professional, because he believed it gave him an advantage in the proceedings, stating, "if I had a lawyer he would crimp my style . . ." (ER 556).

of that baseless argument does not present any question warranting the Court's review.

STATEMENT OF THE CASE

1. *The Work At Issue*

L. Ron Hubbard was the author of numerous original religious works of the Scientology religion, of which he was the founder. Many of Hubbard's works have been published and made generally available, while others have not. Among the unpublished works is a body of works referred to as the NOTs Series (ER 145). The Series is composed of 55 separate and discrete copyrighted "issues," identified by number, which are used by specially trained and qualified ministers of the Scientology religion in providing spiritual counseling to parishioners at a limited number of advanced Churches of Scientology (ER 3, 17-20, 73-75, 145-47). Each individual component of the NOTs Series – such as NOTs Series 34 – is separate, discrete, and finite, with an individual heading and closing, a start and a finish. (*Id.*)[3/]

[3/] Although NOTs Series 34 is registered as a component part of the NOTs Series, as the district court held, it is entitled to copyright protection as a separate work (ER 288 at n.3). Where, as here, a series of unpublished works is registered as a single collection, the registration "extends to each copyrightable element in the collection," 37 C.F.R. §202.3(b)(3)(B)(4); *American Geophysical Union* v. *Texaco, Inc.*, 802 F. Supp. 1, 17 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995) (for purposes of fair use analysis, "copyrighted work" is individual periodical article, even though copyright covered entire issue); *Szabo* v. *Errisson*, 68 F.3d 940, 943 (5th Cir. 1995) ("[W]hen one copyrights a collection, the copyright extends to each individual

After Hubbard's death in 1986, his estate granted to RTC an exclusive license in the NOTs copyrights (ER 34-47). RTC has received from the Register of Copyrights certificates of registration of these copyrights (ER 51-61). The registration certificates protect each NOTs issue as a separate work.[4/]

2. *Defendant's Infringement Of RTC's Copyright In NOTs 34*

Henson was in the courtroom on March 29, 1996, when District Judge Ronald M. Whyte, of the Northern District of California, ruled that he would issue a preliminary injunction prohibiting one Grady Ward from further infringing RTC's copyrights in certain unpublished religious works. *Religious Technology Center* v. *Ward*, No. 96-20207-RMW (N.D. Cal.) ("the *Ward* case") (ER 4-5). Ward had copied and distributed RTC's copyrighted works on the internet, was threatening imminent additional postings, and had publicly solicited copies of RTC's proprietary materials. The *Ward* injunction encompassed NOTs 34.[5/]

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work in the collection even though the names of each work are not expressly listed in the copyright registration," collecting cases). Henson does not argue that either *Texaco* or *Szabo* are incorrect as a matter of law, only that the district court somehow incorrectly applied them to the facts of this case.

[4/] The NOTs issues are of immense value as well as spiritual significance to RTC, which has taken extraordinary measures to protect their confidentiality (ER 4). *See Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231, 1254 (N.D. Cal. 1995).

[5/] Henson previously had attended a preliminary injunction hearing in another case before the same court, following which Judge Whyte enjoined one Dennis Erlich from infringing RTC's copyright in several unpublished works, including NOTs 34.

The next day, Henson electronically copied, transmitted and displayed ("posted") on an internet newsgroup called alt.religion.scientology, or "a.r.s.," a copy of NOTs 34 in its entirety. At the same time, Henson posted "An Open Letter to Judge Whyte," stating that he was in the courtroom at the Ward hearing and, in effect, daring the district court to enjoin him as well. Henson solicited additional copies of the NOTs Series, "stolen or not," to be sent to him (ER 73-87, 146). Only two sentences of Henson's two page "open letter" were directed at the contents of NOTs 34, and those sentences referred to only one paragraph, consisting of 33 words, of the two page work, which Henson nevertheless copied and displayed verbatim.

RTC immediately sent Henson a cease and desist letter (ER 181). Henson responded by: (a) telling RTC's counsel that she could "take [her] demand, fold it till it is all corners, and stick it where 'the sun don't shine'"; (b) reposting a copy of NOTs 34 on the internet; (c) soliciting additional copies of the NOTS Series "acquired by legal, or *illegal* means"[6/] from any and all internet users; and (d) threatening to post some or all of the NOTs Series works to the internet (ER 89-91).

3. *Proceedings In the District Court*

On April 4, 1996 RTC filed this copyright infringement action against Henson seeking injunctive and declaratory relief, statutory damages, and attorneys' fees. The district court issued a temporary restraining order on April 5 (ER 776), and a preliminary injunction on April 12, 1996 (ER 109-116).

Religious Technology Center v. *Netcom*, 923 F. Supp. 1231 (N.D. Cal. 1995).

[6/] The use of asterisks around words in postings to usenet newsgroups is the customary method of signaling emphasis.

On May 6, 1997, the district court granted RTC's motion to expand the preliminary injunction to encompass all of the copyrighted unpublished works of L. Ron Hubbard for which RTC is the exclusive copyright licensee (ER 302-310). The Court acted because on February 24, 1997, Henson had posted yet another message to the internet soliciting "various secret cult crap," which he explicitly threatened to post to the internet, and daring RTC to "get your act in gear and get my injunction extended" (ER 245).

On April 15, 1997, the district court granted RTC's motion for partial summary judgment on its copyright claims (ER 286-301). The court held that RTC owned an existing, valid and registered copyright interest in NOTs 34,[2/] and that Henson admitted copying it, knowing that it was copyrighted. The court rejected Henson's fair use defense, because *inter alia*, Henson's use "is only minimally transformative and does not appear to be in good faith" (ER 293); the work was unpublished; and Henson copied the work in its entirety.

The district court specifically rejected Henson's argument that his *verbatim* postings of the entire NOTs 34 work was justified under the fair use doctrine, or otherwise, because, according to Henson, the document encourages the illegal practice of medicine:

> Henson suggests that where there is a matter

[2/] *Accord, Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2nd 1569, 1572 (E.D. Va. 1996). Henson falsely claims that the validity of the copyright in NOTs 34 was called into question in *Bridge Publications, Inc.* v. *F.A.C.T.Net, Inc.*, 183 F.R.D. 254 (D. Colo. 1998). (Pet. at 5, n.3.) As Henson's counsel is well aware, the *F.A.C.T.Net* decision only addressed *published* Scientology works owned by *a different plaintiff*, Bridge Publications. The validity of the copyrights in the unpublished NOTs 34 most certainly *was not* at issue in *F.A.C.T.Net*.

> of public safety involved, the concept of fair use should be extended. . . . The limited commentary in Henson's posting does not reveal that Henson's purpose was to educate the public about the alleged criminal content of NOTs Series 34. Further, Henson does not sufficiently explain why he needed to post the entire text of NOTs Series 34 to educate the public.

(ER 291-92).

The district court issued a permanent injunction to prevent Henson from further infringing activity. The court reserved for trial determination of whether Henson's infringements were willful and the amount of statutory damages.

Trial commenced on May 5, 1998. The jury returned a verdict finding that Henson acted willfully in infringing RTC's copyright in NOTs 34, and assessed statutory damages in the amount of $75,000. The district court entered judgment on May 14, 1998 (ER 318). On June 9, 1998, Henson filed a motion for a new trial (ER 671), which the district court denied on September 28, 1998 (ER 763).

4. *Facts Adduced At Trial Relating To The Willfulness Of Henson's Conduct*

The trial focused on two matters: (1) if Henson's infringement of RTC's copyright was willful; and (2) the amount of damages to be awarded. Henson was the only witness; he was called by both sides. In addition, RTC introduced videotaped excerpts of Henson's deposition testimony.

RTC demonstrated that Henson knew his actions were in violation of federal copyright law; that he considered his infringements to have been committed for fun, entertainment,

and recreation; and that he used his copyright infringement to enhance his status among fellow participants in the "a.r.s." internet newsgroup, who regularly engaged in virulent attacks upon the Scientology religion.

When Henson posted NOTs 34, he knew it was copyrighted (ER 395). He stated, "I figured that there was a very fair probability that I was breaking a copyright law" (ER 465). In spite of his suspicions, Henson did not contact a lawyer, even though as a gainfully employed professional, he could afford to do so, and even though he had retained attorneys in the past with regard to other legal matters (ER 488). Nor did Henson bother to contact RTC to ask for permission to post NOTs 34 (ER 423-24).

Henson testified that he set out to taunt RTC because it was "a lot of fun" (ER 634) and "screamingly funny" (ER 613). In internet postings, Henson referred to RTC as a "punching bag" (ER381, 547) and an "expendable sparing[sic] partner" (ER 383-84, 550) that was to be used in preparation for other, apparently more formidable, opponents. Henson believed taunting RTC was fun. "If they take a hard line and sue, well, there is a limit on how many of these suits [RTC] can keep going, not to mention there is a certain degree of amusement value" (ER 406, 560). Indeed, Henson acknowledged that one of his motives was to drive up RTC's legal costs (ER 546,559-60).

Henson also volunteered that his actions were undertaken to enhance his status amongst those who participated in the "a.r.s." internet discussion group. According to Henson, depending on the level of engagement with RTC, an a.r.s. participant would increase his status (ER 412-13, 614, 617-18, 620-21, 623-25). Henson testified that when he received a cease and desist letter from RTC it was "*a major increment in status.*" (ER 614). Henson's efforts to increase his status on a.r.s. knew no bounds. He acknowledged that once he went so

far as to announce his *desire* to receive a status-enhancing cease and desist letter from RTC:

> Q: Did you let people know you'd received the letter?
>
> A: Oh, yes. Matter of fact, I printed it up and posted it on . . . the cork board where I work.
>
> Q: Right. And before you received the letter, did you indicate that you wanted to receive such a letter?
>
> A: I might have. It was quite a status symbol at that point.

(ER 618).

Finally, as already noted, Henson stated that he infringed RTC's works out of spite, to avenge RTC's successful efforts to enjoin others from similar acts. Trial Ex. 10-42. Indeed, at the conclusion of his trial testimony, when asked by his own counsel whether his "experience with this lawsuit ha[d] deterred [him] from ever posting such materials again," Henson could only answer, "I wouldn't do it openly" (ER 502)!

In the face of this evidence and his own testimony, Henson attempted to convince the jury that his copying of NOTs 34 was undertaken as an act of public criticism in a good faith belief that it was protected as fair use and under the First Amendment. His trial counsel was permitted to argue that defense to the jury (Tr. at 0358, 475-79, 679-80), and the court so instructed the jury (Tr. at 714).

The jury wasted little time in rejecting that defense. The combination of Henson's gratuitous and unnecessary posting of the entire work, his attitude toward RTC, the "entertainment" value he derived from his taunts, his interest in achieving enhanced status among the a.r.s. participants, and his vengeful motive led the jury to the only logical conclusion: that his copyright infringement was willful, and not undertaken in a

good faith effort to use the work "fairly" in furtherance of public debate or criticism. As the district court concluded:

> the evidence presented and attitude exhibited by Henson . . . during trial left the jury with little choice but to find that Henson's infringement was willful.

ER 765.

5. *Proceedings in the Court of Appeals*

Henson separately appealed the district court's permanent injunction order and its final judgment, which incorporated the jury's verdict. The court of appeals consolidated the two appeals.

In his brief in the appeal from the permanent injunction, Henson raised only one issue: that "plaintiff can make no copyright claims [for infringement of NOTs 34] because Congress has no authority under the Constitution to extend copyright protection to instructions for organized criminal activity." Henson did *not* argue that the fair use doctrine otherwise protected his copying NOTs 34, or that the fair use doctrine insufficiently protects First Amendment rights to "political" speech. Nor did he argue that his verbatim copying of NOTs 34 did not constitute copying an entire unpublished work.

The only issues Henson raised in his appeal from the jury verdict were the alleged insufficiency of evidence of willfulness, the alleged excessiveness of the verdict, several evidentiary rulings, and a frivolous claim of misconduct by plaintiff's trial counsel.

In a single opinion, the court of appeals rejected all of Henson's arguments and affirmed the judgment in its entirety. It held that Henson's verbatim copying of an entire unpublished work constituted infringement that was not justified as fair use.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner Did Not Raise the Questions Presented Below

As we have shown, Henson did not raise any of the grounds presented in his Petition in his briefs to the court of appeals. The only question he raised in his appeal from the permanent injunction was whether copyright protection can extend to a document that Henson subjectively and falsely characterized as a "criminal instruction manual," an argument petitioner does not even attempt to raise here.[8] In particular, petitioner did not raise in his briefs on appeal any question concerning the purported tension or conflict between the copyright law and the First Amendment, nor did he attempt to argue that the district court's fair use analysis was incorrect or flawed.

This failure constitutes a waiver, and is fatal to the

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[8] Henson makes passing reference (Pet. at 6) to a district court decision, *United States* v. *Article or Device*, 333 F. Supp. 357 (D.D.C. 1971), which he mischaracterizes as forbidding "the Church" from claiming that its practices can help alleviate medical conditions. In fact, that decision and the decision of the court of appeals in the same case, *Founding Church of Scientology* v. *United States*, 409 F.2d 1146 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 963(1969), upheld the right of the Founding Church of Scientology to make representations in a religious context concerning the value of its practices. Scientologists believe that certain of their religious practices can assist in recovery from what they perceive to be the spiritual causes and effects of medical ailments, in a way that complements, but does not supplant, traditional medicine (ER 93-94, 103-107).

petition.[2]

II. Henson's First Proposed Ground For Review Does Not Raise A Substantial Federal Question, Or A Question Upon Which There Is A Division of Opinion Either Among The Circuit Courts Or With The Decisions Of This Court

Henson posits an inherent conflict between the Copyright Clause and the First Amendment that must be resolved by this case. But as even his petition implicitly acknowledges, both the Court and the circuit courts have encountered little difficulty in accommodating both constitutional provisions within the scope of traditional fair use doctrine, without creating the *per se* type rule Henson demands. The decision of the Ninth Circuit below is consistent with the decisions of other circuits and of the Court. If any potential conflict exists between the two provisions, it can be addressed if and when it arises, rather than in a wholly inappropriate case such as this,

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[2] *See, e.g., Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) (declining to address issue not raised in or considered by court of appeals); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"), *quoting Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) (declining to consider issue considered by district court but not raised before or considered by the court of appeals); *E.E.O.C.* v. *Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"; dismissing writ of certiorari as improvidently granted); *Rogers* v. *Lodge*, 458 U.S. 613, 628, n.10 (1982) ("This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it").

where the defendant knowingly and willfully infringed a copyright in an unpublished work by copying and distributing it in its entirety without significant commentary addressed to the content of the work.

That the First Amendment creates no conflict with the Copyright Act and provides no *per se* safe harbor for copyright infringement was expressly noted by Justice Brennan in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971):

> [C]opyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

403 U.S. at 726 (Brennan, J., concurring). See also *id.*, 403 U.S. at 731, n.1 (White, J., concurring) ("no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another").

The critical distinction, identified by Justice Brennan, is between speech concerning the *ideas* of a work, which is broadly protected, and appropriation of the *expression* of the copyright holder, which is not. *See* 17 U.S.C. § 102(a). The "uninhibited, robust and wide-open" debate on public issues which lies at the heart of the First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), has never been deemed to be furthered by the wholesale theft of the very words of a previous speaker. "It should not be forgotten that the Framers intended copyright itself to be the engine of free expression . . . [by] suppl[ying] the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 558 (1985). Indeed, in *Harper & Row*, the Court expressly rejected virtually the identical argument petitioner posits now "for expanding the

doctrine of fair use to create what amounts to a public figure [or public interest] exception to copyright," holding that First Amendment protections are "already embodied" in the Act's expression/ideas dichotomy and the fair use doctrine. 471 U.S. at 560. The petition here constitutes nothing less than a frontal assault on *Harper & Row*, and a plea to overturn it.

Petitioner, however, can point to no reason, compelling or otherwise, to revisit the issue now, let alone in this case. The lower federal courts have consistently applied the idea/expression dichotomy and the fair use doctrine to protect both copyrightable expression and the free exchange of ideas. No conflict in the circuits has arisen, or is likely to arise. The courts of appeals have uniformly rejected the argument that the First Amendment trumps the copyright protection afforded by Article I, § 8, cl. 8 of the Constitution.[10/] To the contrary, every

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[10/] *See, e.g, Cable/Home Communications Corp.* v. *Network Prod.*, 902 F.2d 829, 849 (11th Cir. 1990) ("With respect to copyright protection, '[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property' . . . . Since the Copyright Act is the congressional implementation of a constitutional directive . . . copyright interests must also be guarded under the Constitution") (quoting *Dallas Cowboys Cheerleaders, Inc.* v. *Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)); *United Video, Inc.* v. *Federal Communications Commission*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989) ("The Constitution grants Congress the power to secure for limited times to authors the exclusive right to their works, and this power generally supersedes the first amendment rights of those who wish to use another's copyrighted work"); *Mitchell Bros. Film Group* v. *Cinema Adult Theater*, 604 F.2d 852, 857, n.8 (5th Cir. 1979) ("The first amendment and copyright are . . . mutually supportive. The financial incentive provided by copyright encourages the development and exchange of ideas which furthers the first amendment's purpose of promoting the 'exposition of ideas'")

federal court that has considered the issue has held that the fair use defense already encompasses First Amendment principles.[11] Petitioner can point to no resulting diminution in the rights of expression of the citizens of the Republic.

Henson does not claim that there is ambiguity in Section 107 of the Copyright Act or need for interpretation of that provision, nor does he point to legislative history that would support his proposed new *per se* rule.[12] Indeed, the legislative

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(quotations omitted); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 759 (9th Cir. 1978) ("the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests") (quotation omitted), *cert. denied sub nom.*, *O'Neill* v. *Walt Disney Productions*, 439 U.S. 1132 (1979).

[11] *See, e.g.*, *Nihon Keizai Shimbun, Inc.* v. *Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine"); *Los Angeles News Serv.* v. *Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) ("First Amendment concerns are . . . addressed in the copyright field through the 'fair use' doctrine"); *New Era Publications Int'l, ApS* v. *Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) ("the fair use doctrine encompasses all claims of first amendment in the copyright field"); *Roy Export Co. Establishment of Vaduz, Liechtenstein* v. *Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1099 (2d Cir. 1982) ("No Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine").

[12] The only "authority" that he offers consists of the ruminations of a few law review article authors who have observed that there is a potential "tension" between the Copyright Act and the First Amendment. Of course, the Court does not sit to hear

history of the Copyright Act of 1976 emphasizes that the fair use doctrine is an"equitable rule of reason" requiring a "case-by-case" analysis, that "precludes the formulation of exact rules." H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. (1976) at 65-66. Contrary to Henson's contentions, the commercial, non-profit, or purported critical nature of a use is "not conclusive with respect to fair use, . . . and should be weighed along with other factors in fair use decisions." *Id.* at 66. *See Harper & Row*, 471 U.S. at 560. What Henson is really asking the Court to do is to usurp the legislative function and effectively amend Section 107. It is, of course, plainly improper to seek such relief from the judicial branch.[13/]

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theoretical cases about potential "tensions" or to resolve potential conflicts between a unanimous federal judiciary and a handful of law review article authors.

[13/] *See, e.g., United States* v. *Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy"); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 194-95 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches").

III. Petitioner's Second Proposed Ground For Review Fails To Raise A Substantial Legal Question Justifying The Court's Exercise of Certiorari Jurisdiction

Petitioner's second proposed ground for review essentially argues that the district and circuit courts misapplied established legal doctrine to the facts and circumstances of this case. Petitioner makes no argument that the district or circuit courts applied a rule of law in conflict with the decisions of the Court or of other circuits. No such conflict is stated or identified.[14] Petitioner merely argues that the lower courts in this case erred in applying the established fair use doctrine, and that they should have found that petitioner's acts constituted fair use.[15]

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[14] To the contrary, petitioner pointedly ignores the decision in *Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2nd 1569 (E.D.Va. 1996), which found copyright infringement of various RTC unpublished works, including NOTS works, in a context similar to that obtaining in this case. Petitioner's citation (Pet. at 25) to an earlier interlocutory decision of the district court in *Lerma* thus is less than candid.

[15] Petitioner attempts to elevate his argument to one worthy of certiorari by conclusorily asserting that the court of appeals did not exercise independent review of the record, citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Putting aside the question of whether *Bose*-type independent review is required in a copyright case, there is nothing in the court of appeals' opinion to suggest that it did not exercise independent review. To the contrary, the court expressly stated that its review of the district court's grant of summary adjudication was *de novo*. The court provided a well-reasoned, albeit brief, opinion, which was justified by the lack of substance to Henson's arguments. Indeed, no case has ever found fair use where, as here, the defendant copied an entire unpublished work verbatim.

As we show below, petitioner is wrong, indeed clearly wrong. But even if the courts below blinked in their application of established law to the facts or in their fact finding, that would not be a proper basis to invoke this Court's certiorari jurisdiction. As recognized in Supreme Court Rule 10, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Indeed, Rule 10 reflects what:

> has always been the Court's practice, but so many petitions have been premised on just such asserted errors that reiteration of their likely futility has been thought necessary. The Court does not sit simply to correct such errors. For a variety of reasons, the Court must concentrate on those cases that present issues of truly national importance, for which there is some "compelling" reason for invoking the Court's jurisdiction.

Stern, Gressman, Shapiro & Geller, *Supreme Court Rules: The 1995 Revisions* at 9 (1997). *See C.J.D. Rudolph* v. *United States*, 370 U.S. 269, 270 (1969); *N.L.R.B.* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176, n.8 (1981).

In any event, the courts below properly applied established fair use doctrine in finding that Henson's infringement was not fair use, a finding confirmed by the jury's rejection of Henson's claim that he had even a good faith belief that his acts were protected by fair use. As the Court repeatedly has emphasized, the four standard fair use factors, as well as any other, are to be considered together, not in isolation; in fact, they overlap to a considerable degree. *Harper & Row*, 471 U.S. at 560-61; *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

The courts below properly found that the first fair use

factor — the purpose and character of the use — militates against a finding of fair use for three critical reasons. First, the fact that Henson copied the entire work verbatim is highly relevant, "for it may reveal a dearth of transformative character or purpose under the first factor [in addition to the third] . . ." *Campbell*, 510 U.S. at 587.

Second, especially when analyzed in conjunction with Henson's verbatim taking of the whole work, his limited commentary *relating to the work itself* substantially undercuts his claim to fair use. Petitioner attempts to make much of Henson's two page "open letter," characterizing it as "political speech" and "social commentary" directing criticism both at the district court and at the Church of Scientology. But the "open letter" dealt hardly at all with the work Henson gratuitously copied in its entirety. Only two sentences of Henson's "letter" address the content of NOTs 34, and they are directed at a single paragraph of the work consisting of 33 words; indeed, Henson makes his "point" by quoting eight words from the work.[16] Such limited commentary cannot by any stretch of the imagination justify copying and displaying the entire two page work verbatim:

> If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery of working up something fresh, the claim to fairness . . . diminishes accordingly (if it does not vanish) . . .

Campbell, 510 U.S. at 580. To justify a use as fair, a copier, even a parodist (which Henson was not), must show that the

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[16] Indeed, the "open letter" by itself demonstrates that it was unnecessary for Henson to copy and dispiay the entire work to engage in his public "commentary" and "criticism."

extent of the use was necessary to achieve his purpose: no more of a work may be taken than is "necessary to make the accompanying commentary understandable." *Supermarket of Homes, Inc.* v. *San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1409 (9th Cir. 1986). Here, Henson quoted eight words, commented on 33, but then proceeded to copy and display an entire two page work.

It was on this basis that the district court held that:

> The limited commentary in Henson's posting does not reveal that Henson's purpose was to educate the public about the alleged criminal content of NOTs 34. Further Henson does not sufficiently explain why he needed to post the entire text of NOTs 34 to educate the public.

Pet. at A15.[17] *Accord, Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2nd at 1574 ("The degree of copying by Lerma, combined with the absence of commentary on most of his internet postings, is inconsistent with the scholarship exception").

Third, the district court properly found that Henson's use "does not appear to be in good faith" (Pet. A16), a finding resoundingly reaffirmed by the jury. *See Harper & Row*, 471 U.S. at 562 ("Fair use presupposes 'good faith' and 'fair dealing'"). Henson not only ignored but defied RTC's cease and desist letters. He repeated his infringement, solicited others to infringe, and threatened to do so again himself.[18] He

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[17] The Petition does not accurately reproduce the district court's opinion; critical language in the above quoted passage was omitted from the reproduced opinion. The quotation in the text above is accurate.

[18] Indeed, Henson's open solicitation of additional unpublished NOTs works "acquired by . . . illegal means" (ER 89-91) so that he

failed to consult with an attorney, and he made no contact with law enforcement officials despite his bogus claim that NOTs 34 was a "criminal instruction manual." He knew that two other individuals had been enjoined from posting the very work he posted. He admitted that he copied the work out of spite (against "the jerks who pissed in my sandbox"), to achieve enhanced status, for fun and entertainment, and to impose substantial litigation and financial burdens on RTC. His attempt to drape himself in the banner of the First Amendment was properly rejected by the jury and the lower courts.

In light of these elements, the fact that Henson sought not fortune, but fame, and that his use was not essentially "commercial" does not render incorrect the lower courts' determination that the first fair use factor tilts decidedly against Henson: "the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character." *Campbell*, 510 U.S. at 584. The lower courts undoubtedly were correct in finding that Henson's bad faith verbatim copying of the entire work, without substantial commentary on the entire work itself, was not a fair use.

The district and circuit courts also properly found that the unpublished nature of NOTs 34[19] is decisive in this case with

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could copy, display and distribute them on the internet is precisely the kind of behavior the Court condemned as bad faith in *Harper & Row*, 471 U.S. at 563 (defendant "knowingly exploited a purloined manuscript"). *See also, Atari Games Corp.* v. *Nintendo of America, Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) ("To invoke the fair use exception, an individual must possess an authorized copy of a literary work"). However Henson obtained his copy of NOTs 34, it incontrovertibly was not an "authorized copy."

[19] Henson contends, in a footnote, that NOTs 34 is not really unpublished because "Scientology has already 'published' the

respect to the second fair use factor, the nature of the work.

The right to withhold publication of an unpublished work is a fundamental right of a copyright holder. *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 551 (1985) ("[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public"); *Salinger* v. *Random House, Inc.*, 811 F.2d 90 (2d Cir.), *supp'd on denial of rehearing*, 818 F.2d 252, *cert. denied*, 484 U.S. 890 (1987) (issuing preliminary injunction barring publication of excerpts from unpublished letters and recognizing value and importance of author's right of first publication).

Henson argues that under the 1992 amendment to Section 107 "unpublished works are to be treated the same as published works. . . ." (Pet. at 24.) This assertion is contrary to the language and legislative history of the amendment. The statute merely states, "The fact that a work is unpublished shall not *itself* bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. § 107 (emphasis added). As the House Report explained:

> The word "itself" is designed to ensure that the courts do not erect a per se rule barring any fair use of unpublished works . . .
> At the same time, it is not the Committee's

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subject text to thousands of persons who have paid the proper fee. . . ." (Pet. at 24, n.25.) As is true of many of the "factual" assertions in the Petition, no evidence is proffered or exists in the record to support this statement, which is contrary to the findings of the courts below (Pet. at A3, A16), and is, in all events, untrue. *See Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231, 1245 (N.D. Cal. 1995); *Religious Technology Center* v. *Lerma*,, 40 U.S.P Q. 2nd at 1575 ("The works in question clearly have not been 'published'").

> intention to alter the weight currently given by the courts to the unpublished nature of a work under the second fair use factor. The general principles regarding fair use of unpublished works set forth by the Supreme Court in *Harper & Row* v. *Nation Enterprises* still apply.

H.R. Rep. No. 102-836, 102d Cong. 2d Sess. (1992) at 9. Thus:

> [I]n making any evaluation of a claim of fair use of unpublished material, the Supreme Court's holding that for purposes of the second statutory factor, the unpublished nature of the work is a "'key, though not necessarily determinative' factor tending to negate a defense of fair use," remains the law.

Id.

The district court properly discounted the relevance of the creative/factual distinction with respect to NOTs 34, on the ground that the distinction does not retain utility with respect to such a religious work. *See also, Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231, 1246 (N.D. Cal. 1995). This derives from the fact that while the author of a religious work will assert its factual truth or validity, a non-believer is more likely to read it as creative. *See Bridge Publications, Inc.* v. *Vien*, 827 F. Supp. 629, 635-36 (S.D. Cal. 1993) ("Hubbard's works are the product of his creative thought process, and not merely informational"). The courts should not, indeed cannot, attempt to resolve such differing perspectives by characterizing a religious work as either factual or non-factual. *United States* v. *Ballard*, 322 U.S. 78 (1944).

The third fair use factor — the amount and substantiality of the portion of the work taken in relation to the entire work — decisively militates against a fair use finding because Henson

copied the entire work. This he cannot do under virtually any circumstance. Even in parody cases, where the parodist is permitted somewhat greater leeway to "conjure up" the original work, the exact or near verbatim copying of the original precludes fair use. *Benny* v. *Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd by an equally divided Court sub nom. Columbia Broadcasting System* v. *Loew's, Inc.*, 356 U.S. 43 (1958); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 757-58 (9th Cir. 1978). *See Campbell*, 510 U.S. at 579-80. As Professor Nimmer has stated, summarizing the cases, "whatever the use, generally, it may not constitute a fair use if the entire work is reproduced." Melville B. Nimmer & David Nimmer, 3 *Nimmer On Copyright* § 13.05(A)(3) at 13--184-85 (1999).[20]

Henson argues here (but did not argue in the court of appeals) that the district court erred in rejecting his contention that all of the 55 collectively-registered NOTs works constitute "the work as a whole" for purposes of the third fair use factor.[21] But the district court simply followed the clearly applicable and controlling copyright law, including the specifically applicable regulation which provides that where, as here, a series of unpublished works is registered as a collective work, the registration extends to each copyrightable element in the collection. *See* 37 C.F.R. § 202.3(b)(3)(i)(B). Although Henson argues that the district court's holding was "erroneous

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[20] Henson's argument that his "liability for copyright infringement should not depend on whether he quoted 10%, 50%, or 100% of NOTs 34" (Pet. at 27) thus is contrary to well-established law.

[21] Henson repeatedly and misleadingly states that he copied only 2 pages of a 700 page work, contrary to the explicit factual findings of the district court

because there is no showing that each work in the NOTs series is 'separately authored and constitutes a discrete original work of authorship'" (Pet. at 26, *citing American Geophysical Union* v. *Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994),[22/] the district court, of course, had a copy of the work-in-suit and was perfectly capable of determining that it was discrete and finite, with an individual heading and closing, a start and a finish. It is wholly inappropriate for Henson to now ask this Court to review such a finding of fact by the trial court, a finding that he did not even challenge on appeal.

Henson also argues that even if the district court's determination as to what constitutes the "work as a whole" was not erroneous, the courts below nonetheless erred in not crediting Henson's contention that he "believed that he could not post any less of [NOTs 34] than he did and persuasively convey his message. . . ." (Pet. at 27.) But even if Henson legitimately held this "belief" — and, as shown above, Henson's true purpose in posting NOTs 34 in its entirety was personal amusement and the acquisition of status among his fellow Internet denizens — it would not constitute a defense to

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[22/] Notably, the district and circuit court opinions in *American Geophysical* recognized the very legal principle upon which the district court relied in this case, *i.e.*, "the 'work' analyzed for the purposes of the third fair use factor of 'amount taken' is the individual work, not the collective work." Pet. A18, *citing American Geophysical*. *Accord*, *Szabo* v. *Errisson*, 68 F.3d 940, 943 (5th Cir. 1995); *Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2d at 1577 ("The works at issue [including works in the NOTs series] are combined in collections and . . . each subpart must be considered a 'single work' for purposes of fair use analysis"). Thus, once again, Henson does not raise a question of law, but merely a question, of no merit, concerning the district court's application of established law to the facts at hand.

copyright infringement. *See, e.g., Love* v. *Kwitny*, 706 F. Supp. 1123, 1133 (S.D.N.Y. 1989) (defendant's use of "huge portion" of copyrighted work to "give his readers the 'full flavor' and lend 'an air of authenticity' to his work "does not make his use 'fair' for copyright purposes"); *Craft* v. *Kobler*, 667 F. Supp. 120, 126 (S.D.N.Y. 1987) ("The claim of fair use would, of course, be abused by quoting an entire chapter to support the argument that the writing style suggested Craft's and not Stravinsky's authorship"); *Salinger* v. *Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) (there is "no inherent right to copy the 'accuracy' or the 'vividness' of [an author's] expression").

Petitioner fastens on the fourth fair use factor — "the effect of the use upon the potential market for or value of the copyrighted work" — as mandating a finding of fair use, no matter what or how the other factors weigh in the analysis. That is not the law. The fourth factor, like the others, "must always be judged in conjunction with the other three criteria." *Marcus* v. *Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983), *citing* H.R. Rep. No. 90-83, 90th Cong. 1st Sess. (1967) at 35. *See also*, H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976) at 65-66. Courts have found no fair use even where the copyright holder failed to prove that the infringing use would have *any* effect on either the present or future market for the work. *See, e.g., Lish* v. *Harper's Magazine Foundation*, 807 F. Supp. 1090, 1104 (S.D.N.Y. 1992).

Here, the district court found that the fourth criteria "weighs slightly in Henson's favor" (Pet. A20), but that RTC's "strong showing with respect to the other factors requires a finding of no fair use as a matter of law." *Id.* The district court properly considered not only whether Henson's act itself would cause RTC market harm, but also, following *Campbell*, 510 U.S. at 590, "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the

original. *See also Harper & Row*, 471 U.S. at 568 ("to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work'").

RTC showed that Henson's copying paralleled that of other participants on the a.r.s. newsgroup, that other persons had misappropriated RTC's unpublished copyrighted works to engage in for profit activities that did cause RTC economic harm, and that RTC had been forced to institute a number of successful legal actions against such infringers.[23] Thus, if the acts of Henson and others were not enjoined, the potential for widespread adverse impact upon RTC would be exacerbated exponentially. Indeed, the district court pointedly noted that "Henson does not dispute this point" (Pet. A19), an implicit concession noted by the court of appeals. Given that danger, the district court certainly did not clearly err in finding that, at most, the fourth factor weighs only slightly in Henson's favor, and was strongly outweighed by the other factors and equitable considerations. Similarly, the court of appeals' reference to Henson's implicit concession was properly considered by it in weighing all the fair use factors. There can be no reason for the Court to revisit this essentially factual analysis in a case such as this, where the evidence of intentional, willful, and bad faith infringement is overwhelming.

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[23] *See, e.g., Religious Technology Center* v. *Ward*, No. 96-20207-RMW (N.D. Cal.), (granting preliminary injunction, subsequently converted to permanent injunction); *Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231 (C.D. Cal. 1995) (granting preliminary injunction, subsequently converted to permanent injunction); *Religious Technology Center* v. *Lerma*, 40 U.S.P.Q.2d 1569 (E.D. Va. 1996) (granting permanent injunction and damages); *Bridge Publications, Inc.* v. *Vien*, 827 F. Supp. 629 (S.D. Cal. 1993) (granting RTC permanent injunction and damages).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(3)

No. 99-456

In the Supreme Court

OF THE

United States

OCTOBER TERM 1999

H. KEITH HENSON,
Petitioner,
VS.
RELIGIOUS TECHNOLOGY CENTER,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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37pp

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INTRODUCTION

The federal question raised by this Petition is substantial indeed: whether the First Amendment permits a copyright owner to use the power of the courts to suppress political speech when that speech interferes not a whit with the goals of the Copyright Act — protection of the copyright owner's commercial interests.

In this case, Respondent persuaded a United States District Court not only to enjoin Petitioner from posting the two-page NOTs 34 on the Internet, but to permit a jury to fine him $75,000 for having done so in the first place. It is hard to imagine a result more chilling, not only to Petitioner's First Amendment rights, but to those of anyone who wishes to criticize powerful organizations like Respondent with written evidence to back up the criticism.

Respondent contends that Petitioner need not have posted the full two pages of NOTs 34 in order to make his commentary understandable. Yet Respondent does not suggest what portion of the document Petitioner should have quoted to make his point persuasively. Indeed, the Opposition quotes not a single word from the document itself.

Petitioner has, accordingly, today filed a copy of NOTs 34, under seal, with the Court. [App. R-1 (filed under seal), also at ER 511-15.] Petitioner believes that examining the document itself is the only way to understand why a full publication of the document was necessary to support Petitioner's claim that it constituted a criminal act and endangered public safety.

In addition to the important constitutional and copyright issues raised, this Petition should be granted because the Ninth Circuit's decision conflicts with and misapprehends this Court's relevant precedents. Sup. Ct. Rule 10(c).

I. HENSON'S COPYING TWO PAGES OF NOTs 34 TO EXPOSE CRIMINAL ACTIVITY WAS FAIR USE, AND HIS FIRST AMENDMENT RIGHTS WERE VIOLATED WHEN THE COURTS BELOW PUNISHED HIM FOR DOING IT

RTC's opposition waxes indignant at Henson's temerity in copying two pages of text. Using phrases like "decisively

militates" and "under virtually any circumstance," RTC stops just short of asserting that a reproduction of an entire work[1] *automatically* precludes a finding of fair use. Opp. at 24-25.[2]

This is an exaggerated legal claim, but particularly so in the context of political speech. "[C]opying . . . the entire work *for a different functional purpose* may be regarded as fair use." M. Nimmer & D. Nimmer, 4 *Nimmer on Copyright* § 13.05[D][1] (1999) (emphasis added). This is precisely what happened here.[3] The purpose of NOTs 34 was to instruct so-called auditors on how to treat medical conditions with a galvanometer and two tin cans.[4]

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[1] Henson does not concede that he copied the "entire work." For purposes of fair use, the 700-page Advanced Technology materials should be "the work" against which the copied two pages are measured. Contrary to RTC's assertion, the district court did not make an "explicit factual finding[]" that Henson copied the work in its entirety. Opp. at 25 n.21. The court made a *legal* finding, which is, of course, subject to appellate review. [App. B at A18.]

Whether an element in a collection of previously unpublished material is "self-contained" has received scant judicial scrutiny. *See* 37 C.F.R. § 202.3(b)(3)(i)(B). In particular, no court has analyzed whether a collection of unpublished material *by the same author* or only a single element of that collection should be considered "the work" for fair use purposes. Even *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), relied heavily on the separate authorship and independent copyright of the journal articles. *Id.* at 926. According to *Texaco*, the only other appellate court to consider this question "recognized that each article constituted an entire work in the fair use analysis." *Id.* (citing *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975)). But *Williams*, which, like *Texaco*, involved journal articles by different authors, *never analyzed the issue.* Instead, *Williams* simply assumed that each article was the standard for measuring fair use. In fact, the word "collective" does not even figure in the decision.

[2] According to a study, courts have found fair use 16.3% (or about 1/6) of the time when "substantial copying" was done. Matthew W. Wallace, *Analyzing Fair Use Claims: A Quantitative And Paradigmatic Approach*, 9 U. Miami Ent. & Sports L. Rev. 121, 137 (1992).

[3] "Different functional purpose" is akin to "transformative use." *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1984).

[4] "The E-meter is essentially a simple galvanometer using two tin cans as electrodes." *United States v. Article or Device "Hubbard Electrometer,"* 333 F. Supp 357, 359 (D.D.C. 1971).

By stark contrast, the purpose of Henson's post was to expose this allegedly illegal "medical" practice to the public.[5] Clearly, Henson's post served a "different functional purpose." As Henson himself explained his own purpose at trial:

> And in my estimation, NOTs 34, and my exposing of it, was the exposure of what I considered to be criminal activity going on inside of Scientology.[6]

Among the many "different functional purpose" cases reported by Nimmer, *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201 (D. Mass. 1986) found Hustler Magazine's reproduction of two photographs in their entirety to be fair. The magazine's purpose was to entertain its readers. There were no damages, no supplanting of the photographer's market. *Id.*

Even more on point is *Belmore v. City Pages, Inc.*, 880 F. Supp. 673 (D. Minn. 1995), in which a police officer (Belmore) wrote a short article that was published in a police union newspaper. City Pages republished Belmore's entire article, preceded and succeeded by critical commentary. City Pages' stated purpose was to criticize a "transparently racist" article by a police officer. *Id.* at 678 n.4.

As the City Pages editor put it, "[my] purpose in reprinting the entire article was . . . to ensure that my readers understood what I was criticizing . . . ." *Id.* at 679. The court agreed, finding the reprinting of the entire article to be "reasonable":

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[5] Petitioner's contention that Scientology is engaged in the unauthorized practice of medicine is not a frivolous accusation. In a case not involving an E-meter, the State of Florida in November 1998 filed criminal charges against Scientology for the unauthorized practice of medicine, arising out of the 1995 death of Lisa McPherson. See Felony Information, *State of Florida v. Church of Scientology Flag Org., Inc.*, Cr. C-98-20377 (Fla. Cir. Ct.).

[6] [ER at 462]. RTC designated selective portions of the record in the appeal to the Ninth Circuit. As Henson was *pro se* at the time, he did not understand the importance of designating a record and so designated none. Later in this Reply, undesignated portions of the sworn trial and deposition testimony are cited to. If certiorari is granted, Henson will ask this Court to expand the formal record in the interests of justice.

> [A]lthough wholesale copying militates against a finding of fair use, this factor does not have significant weight when applied to the unique facts presented in this case.[7]

Both *Haberman* and *Belmore* demonstrate that a finding of fair use may be the only just result even when a work is copied in full. The facts in *Belmore* are remarkably similar to ours. City Pages was making a serious charge of racism against Belmore, just as Henson was making a serious charge of criminal activity against RTC. [App. R-4 at 292:19-293:2, 467:1-4, 507:18-22, 566:20-567:7, 569:2-13] City Pages determined that anything short of a full reproduction of Belmore's article would not "adequately communicate [the] repulsive message," *Belmore*, 880 F. Supp. at 679, just as Henson felt that NOTs 34 had to be quoted in its entirety so that readers could comprehend its somewhat obscure instructions. [App. R-4 at 547:18-25]

Rejecting judicial second-guessing as to how much copying is fair, the *Belmore* court declined to "involve itself in the myriad possible methods of excerpting" the original work. *Id.* at 679. Quoting only Step 4 (as RTC implies he should have) or omitting the text before Step One or after Step Eight would not have made Henson's use any more fair. On the contrary, it would have made Henson's charge that RTC was endangering public health much *less* understandable to the reader and, therefore, *un*fair.[8]

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[7] *Id.* The third factor favored Belmore, but its weight was insignificant in the court's final analysis.

[8] "The Supreme Court has held that a 'productive use' of a copyrighted work, though not determinative, favors a finding of fair use." *Rubin v. Brooks/Cole Publishing Co.*, 836 F. Supp. 909, 916 (D. Mass. 1993) (citing to *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1984)). "A 'productive use' is one that 'result[s] in some added benefit to the public beyond that produced by the first author's work.'" *Rubin*, 836 F. Supp. at 916 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting)).

In this case Henson's post benefited the public by calling attention to RTC's allegedly criminal practice. Nor does there have to be proof that the post "'genuinely . . . benefitted the public,' but only that the use 'could have benefitted the public marginally.'" *Rubin*, 836 F. Supp. at 916; *see also Consumers Union of U.S., Inc. v. General Signal Corp.*,

II. INTEMPERATE SPEECH AND INTEMPERATE SPEAKERS ARE PROTECTED BY THE FIRST AMENDMENT

Scattering shots at Henson throughout its opposition, RTC apparently believes that Henson behaved irresponsibly ("solicited others to infringe"); immaturely (infringed "for fun and entertainment" and "to increase his status"); harassingly (to "drive up [RTC's] legal expenses"); vindictively (because of RTC's past conduct); and defiantly ("daring RTC"). Opp. at 1, 7, & 10.

Such labels are earmarks of persons with causes, who often use extreme speech and behave controversially, and whose speech and conduct are precisely what the First Amendment protects:

> Intemperate speech is a distinctive characteristic of man. Hot-heads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time. The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for retrained [sic] speech and thought against the abuses of liberty. They chose liberty.

Beauharnais v. Illinois, 343 U.S. 250, 286-87 (1952) (Douglas, J., dissenting).

Henson's behavior is not only understandable but praiseworthy when seen through a filter other than RTC's myopic one. Henson earnestly believed that RTC's "teachings" were criminal and endangered the public safety. [App. R-4 at 467:1-4, 507:18-22, 513:5-11, 566:20-567:7, 569:2-13; App. R-5 at 41:14-18; App. C at A27-29] Henson acted in what he perceived to be an overarching public interest. [App. R-4 at 509:8-511:18; App.

(continued from previous page)

724 F.2d 1044, 1050 (2d Cir. 1983) (scope of fair use "is undoubtedly wider when the information conveyed relates to matters of high public concern."), *cert. denied*, 469 U.S. 823 (1984).

R-5 at 38:25-39:5; App. C at A28] His right to speak intemperately (by some standards) is not only protected but cherished. *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944) ("One of the prerogatives of American citizenship is the right . . . to speak foolishly and without moderation.").[9]

Ironically, it is RTC's criticism of Henson that validates Henson's motives and lends dignity to Henson's otherwise "bad-boy" behavior. Henson's passion and intemperance only confirm his noncommercial, political purpose. They are not indicative of "bad faith" but establish precisely the opposite — that his was fair use.[10] In finding to the contrary, the courts below sanctioned the violation of Henson's First Amendment rights.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT OPINIONS OF THIS COURT — OPINIONS WHOSE EFFECT IS TO PREVENT THE COPYRIGHT ACT FROM BEING USED TO SUPPRESS NONCOMMERCIAL POLITICAL SPEECH

This Court's decisions in *Harper & Row*, *Sony*, and *Campbell* establish that a lack of commercial motive and a lack of market harm compel a finding of fair use. This petition should be granted because the Ninth Circuit's decision conflicts with and misapprehends those decisions, particularly in the context of noncommercial, political speech.

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[9] RTC's accusation that Henson solicited others to reproduce RTC's works is a distraction. Opp. at 1. A political speaker typically exhorts others to join him in his political activities. Henson believed that NOTs 34 was a "manual[] for criminal activities" and, as such, *needed* to be copied and exposed. App. C at A26. Henson sought only those materials "describ[ing] criminal activities." *Id.* Moreover, any solicitation by Henson is irrelevant as the judgment against Henson is based only on his posting of the single NOTs 34 document, not on any "solicitation."

[10] Bad faith is found in a "chiseler who infringes . . . for personal profits." 471 U.S. at 562; *see also Roy Export Co. v. Columbia Broadcasting Sys., Inc.*, 503 F. Supp. 1137, 1147 (S.D. N.Y. 1980) (bad faith is based on defendant's commercial motive and use), *aff'd* 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982).

This case presents facts diametrically opposed to those in *Harper & Row*, in which the defendant had invoked the First Amendment to avoid a claim of copyright infringement for a clearly *commercial* use. 471 U.S. at 562. However, Henson had no commercial motive, *as Respondent concedes.*[11]

Sony, 464 U.S. at 451, sets forth the controlling law:

> A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.

Here, the District Court found that there was no substantial likelihood of future market harm to RTC. App. B at A20. The Ninth Circuit did not disturb this finding. Accordingly, the Ninth Circuit erred in determining that Henson's posting of NOTs 34 was not a fair use. *See, e.g., National Rifle Ass'n of America v. Handgun Control Federation of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994) (use "in exercising . . . First Amendment speech rights to comment on public issues" held fair); *Sundeman v. Seajay Society, Inc.*, 142 F.3d 194, 206 (4th Cir. 1998) (use that does not materially impair marketability generally deemed fair).

Instead, the Ninth Circuit misapprehended the meaning of actionable market harm by summarily noting that Henson had "conceded that such copying would lead to market harm." App. A at A-3. Henson, however, merely conceded that his criticism of Scientology may adversely affect the marketability of RTC's works "*not* because people will take the material from the

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[11] Recognizing the lack of a commercial motive, RTC expends much of its Opposition trying to show that Henson's motive in the copying was to increase his status. Opp. at 1, 9, 22. Of course, RTC can point to no legal authority — and none exists — holding that pursuit of "fame" or "status" can serve as a substitute for commercial motive in the fair use analysis. As *Harper & Row* noted, "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." 471 U.S. at 562. Henson did not attempt to profit from exploitation of NOTs 34; instead, he attempted to expose an alleged threat to public safety and protest an infringement of his First Amendment rights to discuss such threats.

internet and use it," but because it "will convince the public not to buy the product because it is rubbish." App. B at A19. This is precisely the type of market harm stemming from "biting criticism [that] suppresses demand" that this Court held is *not actionable* under copyright laws. *Campbell*, 510 U.S. at 592; *see also New Era Publications Int'l, ApS v. Carol Publishing Group*, 904 F.2d 152, 159 (2d Cir.) (market harm to L. Ron Hubbard biography caused by "devastating critique" of Hubbard was not within scope of copyright protection), *cert. denied*, 498 U.S. 921 (1990).

This Court noted in *Harper & Row* that the market effect of the use is "*undoubtedly the single most important element of fair use*." 471 U.S. at 566 (emphasis added). If the alleged infringer has no intent to exploit the copyrighted material for monetary gain, and no actionable market harm to the copyright holder exists, it plainly furthers both the First Amendment and the aims of the Copyright Act to allow the speech to take place.[12] "Copyright law is not designed to stifle critics." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

The Ninth Circuit's decision also misapprehends *Harper & Row* in applying a presumption against fair use to "unpublished" works.[13] Where, as here, there is no effect on the market for an unpublished work, the courts have found fair use. *See, e.g., Wright*

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[12]Here, Henson was engaged in pure *political speech*, which receives the highest level of First Amendment protection. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 421-22 (1992) (Stevens, J., concurring).

[13] The implication of the *Harper & Row* decision as to the fair use of unpublished works is in need of clarification by this Court. Unfortunately, some courts have seized on the statement in *Harper & Row* that "the scope of fair use is narrower with respect to unpublished works" in applying a virtual presumption against a finding of fair use with respect to unpublished works. 471 U.S. at 564; *see, e.g., Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 582 (2d Cir. 1989); *Sinkler v. Goldsmith*, 623 F. Supp. 727, 732 (D. Ariz. 1985). Although Congress amended Section 107 of the Copyright Act in 1992, the presumption continues. *See, e.g., CSM Investors, Inc. v. Everest Dev., Ltd.*, 840 F. Supp. 1304, 1313 (D. Minn. 1994). Here RTC incorrectly claims that the Ninth Circuit and District Court "properly found" the "unpublished" nature of the work "decisive." Opp. at 22.

v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991) (use of unpublished letters); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147 (N.D. Cal. 1994) (same); *Sundeman*, 142 F.3d at 208 (quotation from unpublished manuscript).

IV. HENSON RAISED THE FIRST AMENDMENT AND FAIR USE ISSUES BELOW BUT RTC *OPPOSED* HENSON'S MOTION TO HAVE PRO BONO COUNSEL FULLY BRIEF THOSE ISSUES

RTC argues that this Court should not grant certiorari because "Henson did not raise any of the grounds presented in his Petition in his briefs to the court of appeals." Opp. at 12.

This assertion is untrue. Henson repeatedly raised the First Amendment and fair use issues in his *pro se* briefs on these appeals.[14] [*See* App. R-2, App. R-3.]

RTC also neglects to mention that it *opposed* Henson's motion to file a formal brief more fully addressing the issues below after he found *pro bono* counsel in November 1998 — an event that took place after he had already filed his *pro se* briefs.[15] Because RTC refused to stipulate to allow Henson to file counsel-prepared briefs, Henson, in December 1998, filed a motion requesting leave to file a new brief addressing "the application of the fair use defense, and specifically the first amendment, to

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[14] Henson's four-page *pro se* brief appealing the District Court's grant of summary judgment on the copyright infringement claim (No. 97-16160), clearly raises these issues as grounds for appeal. *See* App. R-2 at 3 ("[W]hile the Constitution gave Congress the power to grant copyrights for the general welfare, such laws could not be extended to override the First Amendment and protect criminal activity from disclosure."). Similarly, the *pro se* brief appealing the judgment (No. 98-16146) also raises these issues. *See, e.g.*, App R-3 at 7 ("Defendant believed that the Court's temporary restraining order if applied to him was a violation of his First Amendment rights to discuss the criminal activities of the cult of Scientology with examples. This was his intent in posting NOTs 34 on March 30, 1996. . . . "). Henson's original posting also raises these issues. [App. R-1, filed under seal].

[15] RTC's claim that Henson refused four offers of *pro bono* assistance is false. Henson spoke to various lawyers about the possibility of representing him on a *pro bono* basis in this action, but *none agreed to do so* until November 1998. 4/2/96 Hearing Tr., at 2:2-3:20, App. R-6.

copyright infringement" with citation to legal authority. Motion for Leave To File A Formal Brief, at 2.

RTC aggressively opposed this motion, arguing in its 20-page opposition that: (1) granting the motion would prejudice RTC and (2) "*there is no reason to believe that any further 'formal' briefing by new counsel on these issues would 'aid' the Court in any way.*" Opp. to Motion to File Additional Brief, at 6-19 (emphasis added). In February 1999, the Ninth Circuit denied Henson's motion. Having actively opposed Henson's attempt to brief the issues fully, RTC cannot now hide behind Henson's inability to state his legal arguments more artfully.

In addition, at the March 2, 1999 oral argument on the appeals, Henson's *pro bono* counsel fully argued the fair use issues to the Ninth Circuit, including those raised in this Petition.

Finally, the Ninth Circuit itself addressed the First Amendment and fair use issues, noting that Henson had raised them. [App. A at A2-A4.][16]

Respectfully submitted,

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ANN I. PARK
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Attorneys for Petitioner

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[16] Even if the issues had not been raised in the Ninth Circuit, this Court could still address them. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("Though we do not normally decide issues not presented below, we are not precluded from doing so.").

APPENDIX R-1

FILED SEPARATELY UNDER SEAL

APPENDIX R-2

PETITIONER'S PRO SE BRIEF
IN SUPPORT OF APPEAL NO 97-16160
(Reproduced In Full, Emphasis Added)

CASE NO. 97-16160

2. What are the facts of your case?

Defendant wrote a letter to the District Court asking if the Court was aware of the contents of one of the of the [sic] documents it had enjoined from being disclosed in that case. When the Court did not respond, defendant posted the letter (which included about two pages of a document called NOTs 34 -- THE SEQUENCE FOR HANDLING A PHYSICAL CONDITION) to the Internet. **Defendant's purpose (as stated in the letter) was to find out if the District Court knew that it, and the trade secret/copyright laws, were being used to suppress the free discussion of matters of public concern, and to warn the public of the sometimes lethal dangers of Scientology.** RTC, the purported copyright enforcer, (though not holder) sued the defendant for trade secret and copyright violation. RTC later dropped the trade secret claims with prejudice.

Defendant tried to get the District Court to rule on the contents of NOTs 34 being essentially an instruction manual for criminal activity (practice of medicine without a license) or a violation of an earlier order by Judge Gesell which forbade Scientology to make the type of emeter related healing claims made in NOTs 34. However, the District Court refused to rule

that the contents (if carried out) were or were not criminal in nature or if they violated the terms of Gesell's order.

Defendant also argued that the copyright laws were being misused, and that the [sic] while the Constitution gave Congress the power to grant copyrights for the general welfare, such laws could not be extended to override the First Amendment and protect criminal activity from disclosure. These arguments were rejected and the defendant was further enjoined from supplying a copy of NOTs 34 i.e., evidence of criminal activity and violation of a previous court order, to the FDA.

The District Court then ruled in summary judgment that the defendant had violated the copyright of RTC.

Defendant appealed.

3. What did you ask the district court to do (for example, award damages) give injunctive relief, order your release from prison, etc.)?

See above.

4. State the claim or claims you raised at the district court.

NOTs 34 is a criminal instruction manual for the illegal practice of medicine with an FDA regulated device known as an emeter. On that basis the plaintiff can make no copyright claims because Congress has no authority under the Constitution to extend copyright protection to instructions for organized criminal activity.

(If the Appeals Court has any doubt about the dangers and sometimes lethal effects of Scientology's quack "medical" procedures, it may consult the November 1, 1997 front page story in the New York Times, or Newsweek July 21,1997, page 77 "A Death in Clearwater." The latter was made part of the record.)

5. What issues are you raising on appeal?

Same as 4.

(Appendix R-2)

6. Did you present all these issues to the district court?

Yes

7. What law supports these issues on appeal? (You may, but need not, refer to cases and statutes.)

I believe this to be a case of first impression.

To my knowledge not even the tobacco industry was so brazen as to use copyrights or trade secrets to suppress their leaked internal documents. (Though they certainly could have, and before this trial Court might have prevailed.)

My question to the Courts is the same as the date I wrote the open letter to Judge Whyte. Is it proper to use copyright and trade secret laws to prevent public disclosure of criminal activity?

So far, the answer has been yes.

8. Do you have any other cases pending in this court? If so, give the name and docket number of each case.

None

9. Have you filed any previous cases which have been decided by this court? If so, give the name and docket number of each case. RTC vs Henson, No. 97-15109

APPENDIX R-3

EXCERPTS FROM
PETITIONER'S PRO SE BRIEF
IN SUPPORT OF APPEAL NO 98-16146
(Emphasis Added)

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2. What are the facts of your Case?

[Based on a denied motion for new trial filed June 5, 1998 by defendant's counsel at trial Graham E. Berry.]

Facts prior to trial are summarized in Appeal No. 97-16160. That appeal has been noticed for possible oral argument, but a date has not been set. If the Appeals Court so desires, these appeals may be consolidated.

On May 11, 1998, the jury in this case rendered a verdict that, in effect, found that copyrights could be used to conceal criminal conduct and that people could be punished for exposing such activities if they quote too much copyrighted material for context. Such a finding was clearly contrary to public policy and the purpose of the copyright legislation -- so much so that the jury's finding has generated significant internet debate and national media interest such as the lead editorial on July 21, 1998 in the Wall Street Journal. Plaintiff also applied for fees and costs in the amount of nearly $1,000,000, and were awarded costs of about $20,000 and attorney fees of $75,000. Defendant, a person of limited means was forced to filed [sic] for protection under Chapter 13 bankruptcy.

(Appendix R-3)

I. THE CASE THROUGH TRIAL

Defendant H. Keith Henson is a consulting engineer in the computer hardware and software business. (Tr. Vol. 4, 436:13-20). Defendant has long had an interest in areas of free speech, particularly in recent years in connection with the establishment, development, and expansion on the internet. (Tr. Vol. 4, 442:5-9). Defendant became aware that one of Plaintiff's attorneys had attempted to "cut off the free speech rights of anybody who wanted to discuss" the topic of Scientology on the news group alt.religion Scientology--ARS (Tr. Vol. 4, 442:17-444:18).

Defendant then proceeded to take an interest in ARS and read tens of thousands of postings to that news group. (Tr. Vol. 4, 444:19-23). Between January 11, 1995 and March 30, 1996, Defendant would spend up to 45 minutes a day, sometimes twice a day, reviewing the posts to ARS, and making about 1200 postings (500 to 1000 pages of text) in an ongoing and wide ranging debate. (Tr. Vol. 4, 448:7-12). Defendant became aware that the trial Court enjoined Grady Ward from posting certain documents including NOTS 34. (Tr. Vol. 2, 204:11-25). The trial Court had enjoined Mr. Ward from posting or publishing a number of documents including one called NOTS 34. (Tr. Vol. 4, 471:11-472:19). Defendant was aware that NOTS 34 was part of Scientology's upper levels OT-1 through OT-8. (Tr. Vol. 4, 462:3-14). Between January 11, 1995 and March 30, 1996, Defendant had seen NOTS 34 on the internet on perhaps 20 different occasions. He was not aware of anyone's having been sued for posting it. (Tr. Vol. 4, 478:6-20). In fact, defendant had at one time obtained a copy of NOTs 34 from a scientology associated web site (theta.com).

After the Grady Ward temporary restraining order had issued, Defendant went looking (on the news spool of Netcom) for the various items that were on the list of documents enjoined.

(Appendix R-3)

NOTS 34 was the first document that turned up in that search. (Tr. Vol. 4, 479:10-18). Defendant then wrote a letter (Defendant's Exhibit "A") to the trial Court seeking clarification as to whether he was bound by the Ward temporary restraining order, and commenting on the material and the effects such injunctions would have on public debate. (Tr. Vol. 4, 474:7-475:8) He was not aware that a judge could not respond to correspondence such as his letter. (Tr. Vol. 4, 475:7-8). On March 29, 1996, Defendant spoke to the trial Court's Clerk and was told that he was not a party to the Ward case. He concluded that he could safely post his open letter to the trial court on the internet under his own name, commenting on both the contents of it and the social policy of using trade secret and copyright law to discourage public knowledge of its content. By word count the comment and the original document are about the same length, the comment is longer if you discount common elements to the NOTs series such as address blocks. (Tr. Vol. 4, 475:22-478:4).

Defendant believed that the Court's temporary restraining order if applied to him was a violation of his First Amendment rights to discuss the criminal activities of the cult of Scientology with examples. This was his intent in posting NOTS 34 on March 30, 1996. (Tr. Vol. 4, 481:8-16). By March 13, 1996, Defendant had begun to understand what NOTS 34 was all about. (Tr. Vol. 4, 481:17-19). At the damages hearing, he explained his understanding. (Tr. Vol. 4, 481:20-504:24). As part of that understanding he believed that NOTS 34 involved the use of an E-meter. (Tr. Vol. 4, 496:7-499:16). He saw no reference in the NOTS 34 document recommending a Scientologist seek medical attention along with or in place of auditing with an E-meter. (Tr. Vol. 4, 499:21-500:2).

He had also acquired information that had led him to believe that Scientology E-meter processing could lead to dangerous physical conditions, even death. (Tr. Vol. 4,

500:4-501:1). Defendant was also aware and stated so in the letter that the Church of Scientology was under a court order stemming from the FDA's actions in the early 1970s against making medical claims involving the use of the E-meter. (Tr. Vol. 4,:13-506:13). Defendant concluded that NOTS 34 was a direct violation of Judge Gessel's injunction and further constituted an example of criminal activity on the part of Scientology. (Tr. Vol. 4, 506-508:17). After Defendant posted NOTS 34 (and his comment in the context of the letter to the trial court) to the internet on March 13, 1994, he received an e-mail from Scientology attorney, Ms. Kobrin. That e-mail contained a copyright claim. (Tr. Vol. 4, 508:3-8). **However, Defendant did not believe that it was at all proper to claim copyright protection for criminal instruction manuals.** (Tr. Vol. 4, 517:4-6. See generally, Tr. Vol. 4, 508:9-517:6).

Religious Technology Center, one of the corporations and Churches of Scientology then sued Defendant alleging trade secret and copyright violations. Subsequently, RTC dismissed its trade secret claim and proceeded with the copyright claim alleging one violation. Plaintiff's motion for summary judgment was granted and is the subject of Appeal No. 97-16160. That appeal has been noticed for possible oral argument, but a time has not been set.

Defendant's defense of fair use was rejected principally because the document (about two pages) was copied and posted in its entirety, though is it but a small fraction of the registered unit of some 60 NOTs issues. The matter would have been gone to a bench trial except for a recent Supreme Court decision that even statutory damages required a jury trial. The matter then proceeded to a hearing before a jury upon the issue of statutory damages. Until approximately one week before trial, Defendant had been pro per. He then borrowed against a credit card to retain counsel to represent him at the evidentiary hearing which commenced on May 4, 1998. At trial, the central issue was

whether Mr. Henson's posting of NOTS 34 on March 30, 1996 was willful and what damages should be awarded to RTC for that infringement.

* * * *

On May 12, 1996, the jury returned a verdict finding that Defendant's infringement of the copyright in Plaintiff Religious Technology Center's work was willful and awarded damages to Plaintiff in the amount of $75,000. (Tr. Vol. 5, 725:16-23). Defendant now appeals on the grounds that the verdict was against the weight of evidence, the damages were excessive, there are errors in excluding evidence and the conduct of Plaintiff's counsel improperly influenced the deliberative process.

II. THE VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE

* * * *

As noted above, Defendant testified at length as to his good faith and reasonable belief that NOTS 34 constituted the unlawful practice of medicine in violation of a district court injunction issued at the request of the Food and Drug Administration. Thus, he had a reasonable belief that his infringement disclosed illegal activity and he further testified at length that he believed he was legally justified by some paramount public interest superseding copyright law. No evidence was offered by the Plaintiff to rebut Defendant's evidence in this regard. Plaintiff did not call one single witness to contradict Defendant's testimony that NOTS 34 involved the unlawful use of an E-meter to "cure" a physical condition. Plaintiff offered no evidence to rebut Defendant's testimony that the use of the E-meter constituted criminal activity by the Church of Scientology in violation of a federal court injunction. Plaintiff offered no evidence, expert or otherwise, on the issue of whether copyrights could be used to conceal illegal activity. On the other

hand, **Defendant testified that he believed that copyrights could not be used to conceal criminal activity.** Consequently, the jury's verdict is against the weight of evidence and should be overturned.

III. THE JURY'S VERDICT WAS EXCESSIVE

* * * *

Defendant consistently testified that he believed that copyright laws could not be used to conceal criminal conduct and that, therefore, no infringement of copyright had taken place, and that NOTS 34 constituted the unlawful practice of medicine, and he reasonably believed that he would not be violating copyright law by posting NOTS 34. Plaintiff sought an award of maximum statutory damages in order to deter Defendant and others from further violations of its NOTS 34 copyright.

* * * *

IV. THERE WERE ERRORS IN EXCLUDING EVIDENCE

* * * *

Defendant's belief in the criminality of NOTS 34 was not reached in a vacuum. He had read materials regarding Plaintiff's criminal activities in general including a May 6, 1991 Time magazine cover story entitled "Scientology, Thriving Cult of Greed and Power". Defendant submitted both an offer of proof re evidence of Scientology beliefs and practices (filed May 5, 1998) and a trial brief on issues regarding the admissibility of evidence and related matters on May 11, 1998. For the purposes of this appeal, the contents of both documents are incorporated herein in their entirety. The court rejected Defendant's offer of proof. It furthermore rejected most of the evidence Defendant

wished to introduce as to his relevant state of mind at the time of the alleged infringing publication. (Tr. Vol. 5, 7:21-6).

Generally, the court rejected all evidence as to defendant's *information or* belief that the Church of Scientology was a criminal cult guilty of other crimes as being irrelevant and highly prejudicial. In his order granting attorney's fees for plaintiff Judge Whyte wrote:

"Much of what Henson tried to do throughout the case was to turn the lawsuit into a trial of Scientology. Therefore, many of the positions he took before trial and much of what he and his counsel wanted to do, and to some extent did do, during trial had no relevance to the pertinent issues."

In limiting the defense to "the pertinent issues," the trial court denied presentation of defendant's knowledge of the Church of Scientology's involvement in widespread criminal and fraudulent activity that, in large part, led him also to conclude that his posting of NOTS 34 did not infringe Plaintiff's copyrights and that Plaintiff's copyright claims were either invalid and/or constituted misuse of copyright.

The court rejected Trial Brief Section III, section A through 11, limited section L, rejected section M through V and severely limited section W through Y. **In doing so, it prevented Defendant from showing that Plaintiff's selective enforcement of its claimed copyrights were really an application of Scientology's "fair game" doctrine against Defendant.** Moreover, it declined to allow Defendant's counsel to show that Plaintiff's representations regarding fair game were false as shown by the authorities cited by Defendant. As the Trial Brief indicated, all of the evidence Defendant wished to introduce as to his state of mind at the time he posted NOTS 34 was known to him at or prior to that time. **It was that evidence that, in large part, led him to conclude that the Plaintiff's use of NOTS 34 had caused death and serious illness and injury and that**

(Appendix R-3)

Plaintiff's criminal and fraudulent activities generally, and specifically in relation to NOTS 34 and other of the upper level materials, constituted misuse of copyright and the use of copyright to conceal and mask criminal conduct. Thus, the

In addition, it was an error to refuse Defendant to introduce any exhibits other than Exhibit "A" and to call any witnesses notwithstanding he had failed to list any exhibits or witnesses prior to his retention of counsel upon the eve of trial. Particularly, since he had been in pro per throughout almost the entirety of the case and facing up to ten lawyers from five different law firms at any one point in time, and had been massively distracted during the months before trial by trumped up civil criminal charges by Scientology operatives in Los Angeles, Riverside (CA), and Clearwater (FL). Such massive overlitigation, and the abuse of the litigation process, by Plaintiff should have led the Court to exercise its discretion in permitting Defendant to avoid the undeniable impression the jury received that, since he had no additional witnesses or exhibits, he had no case to present in his defense. (Tr. Vol. 4, 415:15-19).

Furthermore, the court refused to permit defendant to testify as to the basis of his belief that "someone had been injured by the use of the procedure outlined in NOTS 34." (Tr. Vol. 4, 501:24-502:10). At side bar, Plaintiff argued, and the court agreed, that defendant could not come to a reasonable belief about a subject merely from watching an interview of a former (and now dead) member of scientology he [sic] seen on the television from something like the "Sally Jesse Raphael Show". [A tape defendant had in court and would have played if permitted.] In essence, the court held that defendant's state of mind, and reasonable belief, could not be based upon what he had read or seen in the media. (Tr. Vol. 4, 517:21-518:22). It is respectfully submitted that this is a misstatement and error as to any objective reasonable belief and it is certainly error as to the reasonableness of Defendant's subject of belief. Accordingly,

damages should be reduced, by way of remittitur, and/or a new trial ordered.

* * * *

3. What did you ask the district court to do?

Originally to rule in my favor and against RTC on copyright violation claims on the basis of improper use of copyright.

4. State the claim or claims you raised at the district court.

That copyrights should not be used as a weapon against those who would expose criminal activity.

5. What issues are you raising on appeal.

1. That the verdict is against the weight of the evidence;
2. That the verdict is excessive;
3. There were errors in excluding evidence;
4. Conduct by Plaintiff's counsel improperly influenced the deliberative process.

I am asking the Appeals Court to exercise principals of equity, justice and fair play and to reverse the district court or order a new trial. **The jury was kept from important information and as a result its finding is contrary to each of those things and certainly contrary to what the framers of the Constitution must have had in mind when they provided for the protection of copyrights.** On public policy grounds alone, this appeal should be granted. The Courts should not just leave it to Congress to take the appropriate remedial action for such abuse.

(Appendix R-3)

6. Did you present all these issues to the district court?

To the extent the issues in question were valid at that time and the court permitted them to be raised, I believe so.

7. What law supports these issues on appeal? (You may but need not, refer to cases and statues.)

I believe the underlying issue of using copyright law to conceal criminal conduct is a case of first impression. I am essentially sure that Congress did not have this use in mind when they wrote and passed the copyright laws.

There is case law which support a fair use finding for using as much copyrighted material as is required to accomplish the task at hand, even an entire work. These were cited in the last hearing before Judge Whyte in the related Erlich case, but I failed to hear them clearly enough to obtain the cites.

* * * *

10/13/98

H. Keith Henson
Box 60012
Palo Alto, CA 94306

APPENDIX R-4

EXCERPTS OF PETITIONER'S TESTIMONY AT TRIAL IN UNITED STATES DISTRICT COURT CASE NOS. C-96-20271 AND C-96-20207 (Emphasis Added)

May 6, 1998 at 292:19-293:2

[BY MR. BERRY:] He then asked you as to whether NOTs 34 was a religious work, and you said it was a matter of opinion; correct?

A That's true.

Q And what is your opinion as to whether or not it's a religious work?

A **I believe it is a religious work and a criminal instruction manual for the practice of medicine without a license.**

May 11, 1998 at 467:1-4

[BY MR. BERRY:] **Prior to March 30, 1996, did you believe that the use of the E-meter in connection with NOTs 34 could be dangerous?**

A Yes.

(Appendix R-4)

May 11, 1998 at 507:18-22

[BY MR. BERRY:] Mr. Henson, what was your belief at the time you posted NOTs 34 concerning medical practice, the E-meter and what that constituted?

A Well, I believed it was one -- I believed it was an example of criminal activity on the part of Scientology.

May 11, 1998 at 509:8-511:18

[MR. HENSON]: My -- my understanding of copyright law is heavily predicated on my, on my experiences with the Internet.

And the Internet itself takes copyright very seriously. Indeed, people, customers on the Internet take copyright very seriously.

But it's primarily taken very seriously in terms of crediting where credit is due, rather than -- the Internet provides a forum in which it is assumed that material which has been posted on the Internet will be commented upon and large pieces of it brought into your own posting and then additional material added to that.

With the particular example here, I believed that there was an overriding interest in exposing not merely the document itself, because it was widely available on the Internet, but exposing my understanding of the document as to what it meant and what the consequences of it were, both with respect to it being a dangerous piece of material if carried out, perhaps even lethal, and it being a very bad precedent to use copyright law to suppress the public discussion of what I view, to this day, as criminal activity.

(Appendix R-4)

THE COURT: The question, though, Mr. Henson was did you believe that there was something about copyright law that trumped or preempted, or that was trumped or preempted if the person who posted thought that the document reflected the illegal practice of medicine?

THE WITNESS: Yes, I did.

THE COURT: And where -- go ahead.

BY MR. BERRY:

Q What was that belief?

A My belief in this was based, at least to some extent, on the actions which were going on at the same time with respect to the vast amounts of documents that had been exposed in the tobacco litigation.

Q And how did that impact upon your belief in connection with NOTs 34?

A The tobacco litigation was the exposure of trade secret, and if not criminal, very close to it, activities going on inside the tobacco companies and in my estimation, NOTs 34, and my exposing of it, was the exposure of what I considered to be criminal activity going on inside of Scientology.

MR. ROSEN: Your honor --

THE COURT:That doesn't really answer the question. What did that have to do with copyright law?

THE WITNESS: **I believed, your honor, that copyright law had to fall in the face of more important things like public safety.**

THE COURT:The tobacco litigation did not involve copyright law to your understanding, did it? I just want to understand what you're saying.

THE WITNESS: Of course it did, your honor.

MR. ROSEN: I didn't hear that.

THE COURT: Did it --

THE WITNESS: Everything is copyrighted the minute it is created. That's the way -- that's the nature of the 19 -- of the law that went into effect in 1978.

So the tobacco -- all these internal papers on the tobacco litigation were copyrighted. They just never had the chutzpah, or however it's pronounced, to claim copyright and to try to suppress the documents on the basis of copyright.

May 11, 1998 at 513:5-11

[MR. HENSON]: **In this particular case, I figured that there was a very fair probability that I was breaking a copyright law on it, but in my particular feeling at the time, and for that matter, to this day, I feel that the exposure of much more serious, potentially lethal, public safety problems is more important than the copyright laws.**

And if that is not the case, I suffer for it.

May 12, 1998 at 547:18-25

[BY MR. BERRY:] Now, you posted the entirety of NOTs 34, didn't you?

A That's true.

Q And why did you do that?

A **I didn't believe that any less would suffice to demonstrate the point that I was attempting to make, and I didn't want anybody to be able to say, "well, you're quoting this out of context."**

(Appendix R-4)

May 12, 1998 at 566:20-567:7

[BY MR. ROSEN:] **Mr. Henson, I believe you said yesterday that you honestly thought that NOTs 34 was the illegal practice of medicine when you posted it; is that right?**

A That's correct.

Q And you sincerely believed that and deeply believed that?

A More correctly it is not the practice of medicine, the instructions for the practice of medicine without license.

Q And you sincerely and deeply believe that; right?

A With -- I believe complete justification, yes.

May 12, 1998 at 569:2-13

[BY MR. ROSEN:] Well, let me understand something now, Mr. Henson. The purpose then of your posting NOTs 34 to the Internet was to save people from being exposed to this?

A No.

Q Tell me what your purpose was.

A My purpose was to expose the material.

Q And you thought that this --

A And comment on it.

Q And you thought this material was a crime?

A No.

Q Or an instruction as to how to commit a crime?

A Yes.

APPENDIX R-5

EXCERPTS OF TRANSCRIPT OF PETITIONER'S MAY 8, 1996 DEPOSITION

(Emphasis Added)

38:25-39:5

[BY MR. LIEBERMAN:] And is the same thing true with misappropriating their trade secrets? If you have a sufficient motivation, then it's okay to do that?

A Not motivation. **If there is a sufficient -- like public interest and so forth.**

Q And who determines this?

A You take the risk yourself.

41:14-18

[BY MR. LIEBERMAN:] Uh-huh. Basically you came to your own determination that this was a permissible --permissible use of the NOTs materials; is that right?

A NOTs 34 is criminal on the face of it. Not only that, it's a violation of Judge Gesell's order.

APPENDIX R-6

EXCERPTS FROM OFFICIAL TRANSCRIPT OF APRIL 12, 1996 DISTRICT COURT HEARING RE MOTION FOR ORDER FOR LEAVE TO SHOW CAUSE RE PRELIMINARY INJUNCTION

(Emphasis Added)

Pages 2:2-3:20

THE CLERK: Calling case C-96-20261, Religious Technology Center versus Keith Henson, on for order to show cause re preliminary injunction.

MR. HOGAN: Good morning, Your Honor. Thomas R. Hogan for the plaintiffs, Religious Technology Center. And with me, Your Honor, this morning, if I may, are three lawyers that I would like to move for their admission pro hoc vice. Mr. Roger Milgrim and Mr. Bill Hart are both partners in the Paul, Hastings firm in New York. Mr. Eric Lieberman is a partner in the Rabinowitz law firm in New York.

THE COURT: Have you filed applications?

MR. HOGAN: I have, Your Honor, with respect to all three of those individuals.

THE COURT: All right.

MR. HENSON: Keith Henson, pro per.

THE COURT: Okay. Mr. Henson.

MR. HOGAN: The only other thing I would like to address to the Court very briefly, Your Honor, before we start, is that Mr.

(Appendix R-6)

Henson came to my office on Wednesday of this past week and delivered his motion. I asked him who would be representing him this morning and he advised me that four separate lawyers had offered their services pro bono. He believed, however, he was going to represent himself. I asked him to let me know if any of those lawyers where chosen by him to represent him in this matter, and I have not heard.

THE COURT: . . . With respect to your appearance in this matter, is it your intent to have counsel, or what is the story on that?

MR. HENSON: Not at this time.

THE COURT: Okay.

MR. HENSON: By the way, I would mention that there were four law firms who might be interested, and it's not that any of them have agreed to do it.

THE COURT: I understand. What I wanted to just find out is whether you want to be represented, because that is important to me for me to know for a variety of reasons, including scheduling.

MR. HENSON: **At this point, I simply don't know.**

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No. 99- 456

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

H. KEITH HENSON,

Petitioner,

v.

RELIGIOUS TECHNOLOGY CENTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

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December 3, 1999

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

H. KEITH HENSON,

Petitioner,

v.

RELIGIOUS TECHNOLOGY CENTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

The Electronic Frontier Foundation (EFF) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for *writ of certiorari.* The consent of Petitioner to the filing of this brief has been obtained. Respondent has refused consent.

EFF is a privately funded, nonprofit organization concerned with the civil liberties, technical and social issues raised by the application of new computing and

telecommunications technologies. EFF was founded in 1990 to work in that area where technology and policy converge. As such, we are uniquely able to comment on the harm that a mechanistic application of copyright law can have for free expression on the Internet. Over the past decade, EFF has participated in precedent-setting legal cases, has worked to ensure that any legislation passed or rules promulgated protect individuals' rights, and has led public debate over the equitable use and growth of technology.

Accordingly, we have a vital interest in the instant case, which threatens to silence critics of our government and religious groups. If the lower court's ruling is allowed to stand, this misuse of copyright law will cause our First Amendment rights on the Internet to be permanently harmed. Using copyright claims in this way to squelch criticism also violates the Copyright Clause and denies Petitioner his Fair Use rights.

Respectfully submitted,

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December 3, 1999

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Asked Questions (FAQ):
http://www.faqs.org/faqs/scientology/new-reader-faq/

No. 99-456

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Petitioner,

v.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

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Chris Schafmeister, alt.religion.scientology - Frequently Asked Questions (FAQ): http://www.faqs.org/faqs/scientology/new-reader-faq/

INTEREST OF AMICUS CURIAE[1]

The Electronic Frontier Foundation (EFF) is a privately funded, nonprofit organization concerned with the civil liberties, technical and social issues raised by the application of new computing and telecommunications technologies. EFF was founded in 1990 to work in that area where technology and policy converge. Over the past decade, EFF has participated in precedent-setting legal cases, has worked to ensure that any legislation passed or rules promulgated protect individuals' rights, and has led public debate over the equitable use and growth of technology.

We urge the Court to grant Petitioner's writ of certiari, because Petitioner was within his First Amendment rights when he posted materials on the Internet that criticized governmental and religious activity. Furthermore, Defendant's use of copyright claims to squelch criticism violates the Copyright Clause and denies Petitioner his Fair Use rights.

SUMMARY OF ARGUMENT

While disguised as a simple copyright dispute, this case has serious ramifications to the proliferation of speech on the Internet. For the first time in history, everyday citizens have a medium through which they can disseminate criticisms of others and their government to a wide audience. While copyright law remains an important concern, the needs of copyright holders must be weighed against the rights of individuals to impart and receive accurate information. The Internet permits the dissemination of source documents, from which citizens can become informed and draw their own

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[1] *Amicus Curiae* state pursuant to Sup. Ct. Rule 37.6 that this brief was not authored in any part by counsel for any party. Moreover, no person or entity other than *amicus curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. The consent of Petitioners to this filing of this brief has been obtained. The consent of Respondents has not been refused.

conclusions. Citizens should be able to use source documents within the scope of the Fair Use doctrine.

In this case, an individual re-posted to an Internet newsgroup a two-page document (part of a 700-page allegedly copyrighted work) that attempted to support his assertions that a federal judge had made an erroneous ruling and a religious institution was engaging in illegal activity. Rather than condemn the posting as an illegal copyright infringement, EFF respectfully asks this Court to consider the broader ramifications such a ruling could have on Internet postings used for comment and criticism. True copyright violations must and should be punished. But fair use must be protected on the Internet, and the posting of a source document in support of commentary and criticism in this case was a fair use.

ARGUMENT

I. Petitioner's posting is deserving of the highest level of First Amendment protection.

(a) Petitioner's posting was a criticism of governmental power and religious activity and is of high social concern.

One of the primary purposes of the First Amendment is to protect the free discussion of governmental affairs. This includes discussion of candidates, structures and forms of government, the manner in which government is operated and all matters relating to political processes. *Mills v. Alabama, 384 U.S. 214, 218 (1966).*

Our nation was founded on the principle that freedom of expression is safeguarded by the Constitution. The opportunity to engage in free political discussion ensures that government is "responsive to the will of the people and changes may be obtained by lawful means." *Stromberg v. California, 283 U.S. 359, 369 (1931).* Justice Brandeis articulated the outcome when free speech is diminished: "Fear of punishment or retribution would discourage thought,

repression of ideas would breed hate, and hate would undermine public safety and the functioning of representative government." *Whitney v. California, 274 U.S. 357, 375 (1927).* An open and unfettered forum for public debate ensures a stable and representative government that operates on consensus and participation, rather than under suppression and tyranny.

Keith Henson's posting to the alt.religion.scientology (hereinafter a.r.s.) newsgroup and other newsgroups interested in religious issues criticized government action and the Church of Scientology (hereinafter CoS). Mr. Henson's posting, in the form of an open letter to Northern California District Court Judge Ronald Whyte, explained why he believed Judge Whyte's Temporary Restraining Order prohibiting criticism of CoS in a related case was unconstitutional. In Mr. Henson's words, "I believe the TRO is in violation of my First Amendment rights to discuss the criminal activities of the cult of Scientology." *See Petitioner's Brief at 5.* His letter criticized the issuance of the TRO and justified his statements by providing several paragraphs of original text of CoS documents that showed their involvement in allegedly criminal activities.

Just as copyright law does not restrict an attorney's ability to copy two pages of a copyrighted document and attach them as an exhibit to a court brief for the purpose of providing evidence for an assertion, it cannot justify preventing those who wish to document their criticisms by providing source material so people can make their own determination as to whether or not the criticism is worthy. Without original text, it is impossible for individuals to evaluate such a claim for themselves. To hold otherwise would mean that people must always "take someone's word" about what was said in a given context.

When this Court has previously looked into restrictions on speech critical of the Government, it has held that First Amendment guarantees of free speech and press are paramount and should prevail. Justice Black commented that the Bill of Rights was offered to curtail and restrict the general powers granted to the government. *New York Times v U.S.,*

403 U.S. 713, 716 (1971). In that case, this Court refused to grant an injunction preventing newspapers from disseminating information critical of the Government in international missteps. Similarly, Henson's posting of a letter critical of the judicial treatment in another case involving the Church of Scientology warrants First Amendment protection.

Even if the Petitioner did not present his arguments articulately, and his comments were brief, this type of criticism should not be silenced. This Court commented on this very notion when it stated, "We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and press free to criticize officials and discuss public affairs with impunity. . . . These officials are responsible to the people for the way they perform their duties." *New York Times v. Sullivan,* 376 U.S. 254, 296 (1964). Nor should Henson be punished under the law for succinctly making his points. Brevity is encouraged in skilled writing. Certainly a different standard should not apply had he rambled or added unnecessary verbiage in lieu of the source documents.

Mr. Henson's posting to this newsgroup, which included some allegedly copyrighted material to support his assertion of illegal activity on the part of Respondent, achieves an important First Amendment purpose: his posting was a criticism of a religious institution and the government. As such, it is a matter of high public concern worthy of the highest level of First Amendment protection.

(b) The Internet is a medium for promoting robust communications between diverse groups of people

This Court has found that the Internet is one of the most egalitarian mediums invented and one of the greatest democratic tools of the 21st century. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 851 (1997) (hereinafter "*Reno*"). It is owned by no one, operated by no one, and allows communication across all geographic boundaries. As a medium of convergence, the Internet allows unlimited, low-cost capacity for communication of all kinds, not only

traditional print and news services, but also audio, video and still images, as well as interactive real-time dialogue. Judge Dalzell of the special three-judge District Court assigned to review the Communications Decency Act (hereinafter CDA) concluded that the Internet is "the most participatory form of mass speech yet developed – [and] is entitled to the highest protection from governmental intrusion." *Id.* at 883, 884. The Supreme Court recognized in *Reno* that the Internet is a "unique and wholly new medium of worldwide human communication" which disseminates "content as diverse as human thought." *Id.* at 852. The Court likened expression in online chat rooms to town criers with voices resonating far from the soap box, and likened expression in newsgroups having characteristics similar to traditional street pamphleteers. *Id.* at 870.

Internet activists, like traditional street pamphleteers and their progeny, are afforded the highest level of First Amendment protection, because free speech requires a "marketplace of ideas," where truth and honest debate emerge from a multiplicity of voices. *Id.* at 885. Furthermore, many voices are necessary to protect democracy by promoting the public discussion of competing ideas and fostering the people's participation in society and in their government. The Supreme Court ruled that encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship. *Id.* at 885.

In striking down the CDA in *Reno*, this Court unanimously held that government regulation of online speech would interfere with the free exchange of ideas, and the benefits of encouraging freedom of expression in a democratic society outweighed the proposed merits of censorship. *Id. at* 885. That was important two years ago when *Reno* was decided, and it is even more important today as the population of netizens continues to grow. Approximately 200 million people are now online. *Id.* at 870. Anyone with Internet access may take advantage of a wide variety of communication and information retrieval methods, including email, chat rooms, and newsgroup discussions. *Id* at 851. From a Net browser's point of view, the World Wide Web is like a vast library including millions of readily available and indexed

publications and a sprawling mall offering goods and services. *Id.* at 853.

Newsgroups such as a.r.s. play a critical role in the exchange of speech in cyberspace. Exchanges of speech in newsgroups resemble continuous conversations on any given topic and consist of anything from a few postings to conversations that last for months or years. The participants in these conversations are often opinionated and use the newsgroup forum to debate different points of view on endlessly different subjects. Other times, discussions contain day to day gossip about the day's events. Cyberspace newsgroups such as a.r.s. deserve as much protection as other forms of social debate.

The a.r.s. newsgroup was founded by former members of the Scientology organization to promote open and unabridged discussion and criticism of the Church of Scientology's teachings and practices. According to one participant:

> A.r.s often more resembles a high school lunch room than a genteel sitting room with individuals tending to show allegiance to one of several groups. Among our members we have active and semi-active Scientologists, ex-scientologists who have grown to dislike everything about Scientology, ex-scientologists who believe in the teachings but have learned to dislike the Church of Scientology, and non-scientologists like myself who for the most part believe that everything about the Scientology faith is bunkum and that the Scientology organization is not good for people. As for a.r.s being for or against Scientology, I've been participating for three years now and I often can't tell. But if I were backed against a wall I would say that the mood tends to be more against the Church of Scientology than for it.

Chris Schafmeister at http://www.faqs.org/faqs/scientology/new-reader-faq/.

Shutting down a.r.s or silencing its participants one by one, as is happening in the instant case, offends the First Amendment by chilling speech not only of the Petitioner, but also of others who follow the Church of Scientology legal cases. The Petitioner posted just two pages of a 700 page work. The countervailing interests in this case, protecting the Church of Scientology's alleged copyright to that two-page document, pales next to the severe chilling effect this would have on all future discussions in the newsgroups. EFF respectfully requests that this Court consider the damage that may be done to the Internet if the Church of Scientology is allowed to prevail in its arguments.

II. The lower court disregarded the Copyright Clause's stated goal to promote the progress of science and art in its finding that copyright claims could prevent public criticism and commentary.

The primary purpose of the Copyright Clause is to promote the progress of science and useful arts. *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) (hereinafter "*Sony*"). Copyright was intended to benefit society as a whole and improve culture. By analyzing the copyright issues presented in this case on an erroneous, mechanical, and arbitrary fashion, the lower courts have completely disregarded clearly stated principles behind the Copyright Clause of the U.S. Constitution and have stifled the very creative forces it is supposed to promote.

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. *Id.* Rather, the limited grant is a means by which an important public purpose may be achieved. *Id.* It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. *Sony* at 421.

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. *Sony* at 431-432. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Sony* at 432.

Copyright is intended to increase and not to impede the harvest of knowledge. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 545 (1985) (hereinafter "*Harper & Row*"). Because the lower court's ruling essentially means that copyright law can be used to prevent critical analysis of a work when that criticism would otherwise contribute to public discourse, it cannot be reconciled with the Copyright Act or the Constitution, and therefore it cannot stand.

Copyright law must not trump the First Amendment. This Court has held that copyrights are not superior to rights of free expression. *Rosemont Enterprises Inc. v. Random House, Inc.*, 366 F.2d 303 (CA2 1966). Furthermore, the free dissemination of information dealing with certain newsworthy historical and biographical events serves the public interest and thus outweighs copyright interests. *New York Times v. Sullivan*, 376 U.S. 254. The ability to widely quote from and refer to religious and other philosophical texts is of extraordinary public importance and demands deference to the principles behind copyright's design.

More than a century ago, this Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Baker v. Selden*, 101 U.S. 99, 103 (1880).

The CoS's claims of copyright to squelch speech critical of its teachings flies in the face of copyright's stated purpose and amounts to copyright misuse. The Ninth Circuit recently adopted the rule already accepted in other circuits that copyright misuse is a defense to copyright infringement. *Practice Management Info. v. Am. Med. Ass'n.* 133 F.3d 1140 (9th Cir. 1997). When use of copyright proves antithetical to the interests sought to be advanced by the Copyright Act, the defense of copyright misuse is available. *Id.* See also *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 978-79 (4th Cir. 1990).

From time to time, the Supreme Court has intimated that the similarity of rationales underlying the law of patents and the law of copyrights argues for a defense to an infringement of copyright based on misuse of the copyright. *See, United States v. Loew's, Inc.*, 371 U.S. 38, 44-51 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157-59 (1948); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 865 & n. 27 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980). This Court implied such a rationale in *Harper & Row* when it pointed out that "no author may copyright his ideas or the facts he narrates," and it stressed that it would be an "abuse of the copyright owner's monopoly" for copyright law to become "an instrument to suppress facts." *Harper & Row* at 559. That is precisely what is happening in this case. CoS is using copyright as a club to silence its critics.

Allowing the lower court's ruling to stand in this case would result in widespread negative impact on large groups of people. The public at large would be severely hampered in its ability to discuss and quote copyrighted works on the Internet. Over protecting intellectual property is as harmful as underprotecting it. By using copyright to purposefully

prevent unauthorized discussion or criticism over the substance of work, the law prevents copyright from ever achieving its stated objective.

III. The lower court disregarded this Court's prior rulings in finding that Petitioner's quotations and commentary were not a socially important Fair Use privileged under the Copyright Act.

Assuming, arguendo, that defendant's copyrights on the NOTS Series 34 document are valid, Keith Henson had the right to post it to Internet newsgroups as a fair use of a copyrighted work.

Fair use refers to an individual's right to use copyrighted material in a reasonable manner without the consent of copyright owner. *Harper & Row* at 549. Fair use is an express limitation to the author's exclusive rights under the statute. This Court has historically acknowledged fair use's role in copyright's overall design: "Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, 'while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science.' *Carey v. Kearsley*, 4 Esp. 168, 170, 170 Eng.Rep. 679, 681 (K.B. 1803)." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

At the doctrine's core is a fundamental belief that not all copying should be banned, particularly in socially important endeavors. The fair use privilege was originally a judicially created doctrine, but has subsequently been codified by the copyright statute. 17 U.S.C. § 107. The Copyright Act lists some uses generally considered to be a fair, such as criticism, comment, news reporting, tacking, scholarship or research. *Id.* "The Act employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given." *Campbell* at 577. Mr. Henson criticized Judge Whyte's issuance of a

Temporary Restraining Order in the *Ward* case, Religious Technology Center v. Ward, Case No. 96-20207 RMW. Clearly a socially important endeavor, this should have weighed in favor of finding Henson's use fair.

An equitable rule of reason, the task of deciding if a particular use is "fair" is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. *Harper & Row* at 560; *Sony* at 448, and n. 31. When making a determination of whether a particular use is a fair use, a court generally weighs four nonexclusive factors listed in the statute: purpose and character of the use, nature of the work, amount and substantially of the portion used, and effect on market potential. U.S.C. § 107. This Court has instructed that the factors are not to be treated in isolation, one from another. *Campbell* at 577. "All are to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 578.

The fair use doctrine thus "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

The lower courts misinterpreted the statutory factors in favor of a finding of infringement in this case. In making its determination that Keith Henson's posting infringed RTC's copyright, the lower court relied predominantly on the fact that he posted the entire article and that it had been previously unpublished. This reasoning, however, cannot withstand scrutiny. The extent of permissible copying varies with the purpose and character of the use. *Campbell* at 586. If the purpose is legitimate and the public benefit is enhanced, fair use exemptions should be granted. In *Sony*, this Court recognized that copying a work in its entirety could be considered a fair use in some circumstances. *Sony, supra*, at 417. That Keith Henson posted the entire NOTs 34 article to support the letter he wrote to Judge Whyte is not dispositive of an unfair use. The lower court disregarded this Court's

clear teaching of copyright law by ruling that the mere posting of the document necessitated a finding of copyright infringement.

The lower court also erred by giving too much weight to the fact that CoS's writings were allegedly unpublished. While the unpublished nature of a work may be a factor in the overall fair use balancing test, this Court has ruled that it is "not necessarily a determinative factor tending to negate a defense of fair use." *Harper & Row* at 554. In *Wright v. Warner Brooks, Inc.*, 953 F.2d 731 (2d Cir. 1991), the court found that despite the unauthorized use of previously unpublished quotations, consideration of the other factors favored a finding of fair use. The Second Circuit decision read *Harper & Row* as holding that unpublished works have no per se rule and that "the fair use test remains a totality inquiry, tailored to the particular facts of each case." *Id.* at 740. The authoritative Committee report, H. Rep. No. 102-836, 102d Cong., 2d Sess. 9 (1992) agrees, stating: "The word 'itself' is designed to ensure that the courts do not erect a per se rule barring any fair use of unpublished works. Each claim of fair use of an unpublished work should involve careful consideration of all four statutory factors as well as any other factors the court deems relevant. . . ."

The lower court further erred by finding that Henson's criticism was not extensive enough to merit fair use protection. This holding is in flagrant disregard for Supreme Court teaching in the field of copyright law. In *Campbell*, this unanimous Court found that when the use constitutes commentary that has critical bearing on the substance of the original, the claim to fairness for unauthorized use is stronger. *Campbell* at 580. The Court reasoned that because the copying and use could be perceived as commenting on the original or criticizing it, the claim to fair use should be given more deference. *Id.*

As in *Campbell*, Henson's unauthorized use constituted a criticism of the CoS's ideology and of a government-sanctioned restraint on speech. *Campbell* holds that when courts inquire into the amount of material copied for a critical work and it appears to be a close question, courts

should bear in mind that the goals of the copyright law are "to stimulate the creation and publication of edifying matter." *Id.* at 578. Had the lower court considered copyright's overall purpose of encouraging public learning and promoting the progress of arts of science, it would have ruled against infringement and in favor of a finding of fair use.

The lower court's reasoning cannot withstand further scrutiny on the fourth factor, effect on the market, either. Actual harm or potential for harm to the market is said to be the most significant factor in balancing a fair use analysis. *Harper* at 566. The purpose of copyright is to create incentives for creative effort. "But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit." *Sony* at 450-1.

The district court found no evidence that Henson's actions were likely to cause an adverse impact on the potential market for the Church's work. Henson's sole purpose for posting the materials was to criticize Judge Whyte and to educate the public. He did not act for personal or financial gain. Because Henson's posting was for a noncommercial purpose and no harm was demonstrated, the lower court erred in finding the use an infringement. Balancing all the factors in light of the nature of the use weighs in favor of Mr. Henson's fair use of the NOTS Series 34 document.

"The Fair Use doctrine thus permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990). The lower court should have followed this Court's teachings in analyzing the fair use factors, rather than the mechanical and arbitrary method it chose. Had it done so, it would have found that a Hensen's posting was precisely the kind of fair use that the copyright law was intended to inspire.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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